No. 17746

United States
COURT OF APPEALS
for the Ninth Circuit

PHILIP WEINSTEIN, et al,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT PHILIP WEINSTEIN

Appeal from the United States District Court for the District of Oregon.

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JURISDICTIONAL STATEMENT

An indictment was filed on January 20, 1961, in the United States District Court for the District of Oregon against Philip Weinstein (appellant in this brief), George James Barnard, also known as James Barnard, Arthur Roscoe Smith, Larry Warren Haynes, Raymond Henry Knippel, Patricia Ann DePlois, also known as Pat Bender, Donald William Johnstone, William Mack Lasiter, Darrel Wayne Saunders, David Leon Boisjolie, Leland Arthur Deegan, also known as Sonny Deegan, Geraldine Ruth Deegan, Ronald Eugene Allison, John Norris Barnard, and Charles Harry Giegerich, also known as Chuck Rich (R. 1).

The indictment contained nine counts, the first eight for mail fraud (18 USC §1341), the ninth count being for conspiracy (18 USC §371).

Weinstein was charged in Counts VI, VII, VIII and IX. Judgment of conviction was entered against him upon the verdict of the jury. He appeals from that judgment.

Jurisdiction of the court below was predicated upon 18 USC § 3231. The jurisdiction of this court is based upon 28 USC § 1291.

SUMMARY OF INDICTMENT

The indictment contains nine counts. All relate to the staging of automobile collisions for the purpose of obtaining money from insurance companies for personal injury. Weinstein was not named in the first five counts.

Count I:

Collision February 16, 1960. Defendants George James Barnard, Arthur Roscoe Smith (guilty plea), and Larry Warren Haynes (guilty plea).

Count II:

(Same as Count I, with exception of different mailing.)

Count III:

Collision September 5, 1959. Defendants George Barnard, Donald William Johnstone, Patricia Ann DePlois, Raymond Henry Knippel, and William Mack Lasiter.

Count IV:

Collision October 16, 1958. Defendants George Barnard, Darrel Wayne Saunders, and David Leon Boisjolie (guilty plea).

Count V:

(Same as Count IV with different mailing.)

Count VI:

Collision September 11, 1958. Defendants Philip Weinstein, George Barnard, Leland Arthur Deegan (guilty plea), Geraldine Ruth Deegan (guilty plea), and Darrel Wayne Saunders.

Count VII:

Collision August 18, 1958. Defendants Philip Weinstein, George Barnard, Ronald Eugene

Allison, John Norris Barnard, and Charles Harry Giegerich.

Count VIII:

(Same as Count VII, with different mailing.)

Count IX:

Conspiracy alleging four separate overt acts plus as additional overt acts all of the overt acts alleged in the first eight counts. The last overt act was dated May 11, 1960 (R. 9). Alleged conspirators are all named defendants, plus Richard L. Sanseri, Donovan S. McCoy, Ann L. Kimmel, Lewis C. Swertfeger, also known as Lewis C. Scott, Ronald A. Miller, Dennis D. Dunham, Gordon L. McCoy, Esther L. Howerton, and James W. Page (R. 7). Five additional conspirators were later named: Catherine Barnard, Alfred E. Wooldridge, Conrad L. Kerr, James F. Barnard, and Keith I. Rose (R. 58).

In connection with the conspiracy count, although not alleged in the indictment, the government introduced evidence of a sixth collision occurring January 17, 1959, involving Alfred Wooldridge, Conrad Kerr, James F. Barnard, and defendant Raymond Knippel.

All defendants were convicted on all counts as charged, excepting George James Barnard was acquitted as to Counts VII and VIII (R. 228).

STATEMENT OF THE CASE

This is the appeal of defendant Philip Weinstein. At the time of trial he was 48 years old (XXIV, 4674). Weinstein had a highly successful law practice in Portland, Oregon, commencing shortly after World War II (XXIV, 4678). Weinstein handled hundreds of personal injury and criminal cases (XVI, 3033; XXIV, 4680; Ex. 499). He had a wide acquaintance in the Portland area (XXII, 4304; XXIV, 4680).

In the eight-month period starting a month before the first collision alleged in the indictment involving Weinstein and ending a month after the last said collision (July 1958 through February 1959), Weinstein took into his office 106 new, legitimate personal injury cases. From these 106 cases he eventually made approximately $64,000 (Ex 499; XXV, 4885-4897). In addition to the 106 cases that came in during this critical eight-month period, he also had other business (XXV, 4898).

In 1958, 1959, 1960, five rear-end collisions occurred in Portland which the indictment charges were planned by various of the defendants and named conspirators. In each instance, money was paid to occupants of the struck vehicle by the insuring company of the owner of the striking vehicle. Weinstein's connection with the five collisions was as follows:

Counts I and II—None

Count III—None

Counts IV and V—He started to represent the oc-

cupants of the struck vehicle. He later turned the matter over to another attorney.

Count VI—He represented all of the occupants of the struck vehicle.

Counts VII and VIII—He represented all of the occupants of the struck vehicle.

All occupants of all the vehicles were named as defendants or conspirators in the indictment.

The only named defendants who were not physically involved as occupants in one of the above collisions were Philip Weinstein, George Barnard, William Lasiter and Raymond Knippel. George Barnard was named in each count. The government's evidence showed that George Barnard was active in lining up participants for the various collisions. Lasiter and Knippel were charged with helping to arrange the collision set forth in Count III.

All evidence against Weinstein was circumstantial. There is no direct evidence that he had any guilty knowledge. Weinstein contends there is no sufficient evidence of guilty knowledge.

The evidence against Weinstein was chiefly:

1. He represented a number of the participants (true).
2. He loaned money to a number of the participants (true). — It was the contention of the government that Weinstein was financing the staged-collision participants.

From the foregoing the government would infer guilty knowledge on the part of Weinstein.

The facts and details are carefully discussed infra under Specification of Error No. I—"The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal," and in the Appendix.

The questions involved in this appeal and the manner in which they were raised are as follows:

I—The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal.— Question raised by motion at the end of the government's case (XIX, 3682) and at the end of all the evidence (XXIX, 5677); after verdict by motion in writing (R. 101).

II—The Trial Court Erred in Denying Weinstein's Motion for Separate Trial. — Question raised on motion for separate trial (R. 14-20; R. 80; XIX, 3686; XXIX, 5680).

III—The Trial Court Erred in Curtailing the Cross-Examination of the Witnesses Leland and Geraldine Deegan in Connection with the Alleged Intimidation by Deegan of the Defendant Boisjolie, and other Circumstances Involving the Last Minute Confessions of the Deegans. — This question was raised by questions asked of the two Deegans and offers of proof (III, 487, 508, 519, 535; IV, 720-725, 738-742).

IV—The Trial Court Erred in Denying Wein-

stein's Motion for Access to Certain Documents (Jencks Act):

(a) Statement made to government agents November 1958 by Katherine Hart. — Question raised by request of counsel (XVIII, 3593); denied (XIX, 3650); marked Exhibit K (XIX, 3651).

(b) Thirty-page statement made to government agents July 1960 by Katherine Hart. — Question raised by request of counsel (XVIII, 3492); counsel given only disjointed parts of several pages (Ex. 454, XVIII, 3558-3560; XIX, 3661); remaining pages refused (Ex. I; XVIII, 3503).

(c) Confession of defendant Geraldine Deegan signed the day before commencement of trial. — Question raised by exception of counsel to deletion of a portion (portion furnished Ex. 407; IV, 686; deleted portion Ex. C; IV, 649).

V—The Evidence Showed No Single Conspiracy as Charged, But If Anything, a Group of Conspiracies. — Question raised at end of government's case by motion for judgment of acquittal (XIX, 3685), and again at the end of all of the evidence (XXIX, 5679).

VI—The Trial Court Erred in Admitting Hearsay After the Termination of the Alleged Con-

spiracy. — Question raised by objection to the testimony (VII, 1203, 1204, 1209; motion to strike, VII, 1240, 1241; motion to strike, VII; 1244, 1249; motion to strike, VII, 1252; motion to strike, VII, 1369, 1374); by motion for judgment of acquittal or in the alternative a new trial at the end of the evidence (XXIX, 5681); by exception to the instructions (XXX, 5889).

VII—The Trial Court Erred in Instructing the Jury on Proof of the Existence of a Conspiracy. — Question raised by exception to the instruction (XXX, 5891).

VIII—The Trial Court Erred in Limiting Oral Argument by Weinstein to One Hour. — Question raised by objection (XXVI, 5200; XXVII, 5393-5395; XXIX, 5725; XXX, 5891).

IX—The Matters Involved Were Primarily of Local Concern. — Question raised by motion (R. 84) and argument (I, 36, 37).

SPECIFICATIONS OF ERROR

Specification of Error No. I:

The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal.

Specification of Error No: II:

The Trial Court Erred in Denying Weinstein's Motion for Separate Trial.

Specification of Error No. III:

The Trial Court Erred in Curtailing the Cross-Examination of the Witnesses Leland and Geraldine Deegan in Connection with the Alleged Intimidation by Deegan of the Defendant Boisjolie, and Other Circumstances Involving the Last Minute Confessions of the Deegans. (Infra 93-97; 99-103 for the full substance of evidence rejected, and quotation of the grounds urged at the trial in objection to the rejection.)*

Specification of Error No. IV:

The Trial Court Erred in Denying Weinstein's Motion for Access to Certain Documents (Jencks Act).

Specification of Error No. V:

The Evidence Showed No Single Conspiracy as Charged, But if Anything, a Group of Conspiracies.

Specification of Error No. VI:

The Trial Court Erred in Admitting Hearsay After the Termination of the Alleged Conspiracy. (Infra 120-131 for the full substance of evidence admitted, and quotation of the grounds urged at the trial in objection to the admission; 136-138 for the instruction given on the ending of the conspiracy *totidem verbis,* together with the grounds of the objection urged at the trial.)*

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* This information is set forth in compliance with rule 18 2(d), but in order to conserve space is not set forth here *in haec verba,* it being set forth in the pages referred to.

Specification of Error No. VII:

The Trial Court Erred in Instructing the Jury on Proof of the Existence of a Conspiracy. (Infra 138-139 for the instruction given *totidem verbis,* together with the grounds of the objection urged at the trial.)*

Specification of Error No. VIII:

The Trial Court Erred in Limiting Oral Argument by Weinstein to One Hour.

Specification of Error No. IX:

The Matters Involved Were Primarily of Local Concern.

SUMMARY OF ARGUMENT

Specification of Error No. I:

All evidence against Weinstein was circumstantial; there was no substantial evidence of guilt; all of the evidence was as consistent with innocence as it was with guilt; Weinstein should have been granted judgment of acquittal; the matter should never have gone to the jury.

Specification of Error No. II:

1. The court abused its discretion in not allowing Weinstein's motions for a separate trial. He could not receive a fair trial when tried *en masse* with a group

*See note bottom of page 9.

of clients with bad records. He was branded guilty by reason of his professional association. To try an attorney with his clients will further the trend of discouraging attorneys from representing persons accused of crimes or persons with undesirable backgrounds or reputations.

2. It is error as a matter of law to join defendants in a single trial where some of the charges are unrelated to all of the defendants. In this case, Weinstein had no relation whatsoever to Counts I, II and III. When this was revealed, Weinstein's motion for separate trial should have been granted.

Specification of Error No. III:

Leland Deegan and Geraldine Deegan were defendants standing on a not-guilty plea until shortly before the trial in September 1961. Deegan was indicted for intimidation of the defendant Boisjolie the previous July at Deegan's place of employment. Deegan was jailed for intimidation under excessive bail. He and his wife capitulated, confessed and became the chief witnesses for the government against Weinstein. The court refused to allow Weinstein to cross-examine into the circumstances of the alleged intimidation, as well as into other matters which showed the pressure exerted on the Deegans in order to obtain their confessions. As for the alleged intimidation, had Weinstein been able to cross-examine in full, he could have shown that the Deegans, knowing that the charge was without foundation, realized that further resistance to the government was futile —that Deegan would be in jail indefinitely if he did not cooperate with the government.

Specification of Error No. IV:

Katherine Hart testified she was in Weinstein's office and observed George Barnard leave with money. Within three weeks she voluntarily went to the FBI and gave a statement. Under the Jencks Act, Weinstein should have been allowed to examine the statement. If it had no reference whatsoever to the alleged incident, that in itself, was of considerable importance.

Several years later she gave a 30-page statement to the government. Weinstein was given a couple of pages removed from the context, unintelligible in part. He should have been given the full statement.

Portions of defendant Geraldine Deegan's confession was cut out. Under the circumstances, the entire confession should have been furnished to Weinstein for cross-examination purposes.

Specification of Error No. V:

Count IX charges a single, over-all conspiracy. The evidence shows six individual conspiracies, assuming any is shown. A variance exists between the indictment and the proof.

Specification of Error No. VI:

The last overt act alleged in the indictment was dated May 11, 1960. The court allowed a number of hearsay statements, highly prejudicial to Weinstein, made subsequent to May 11, 1960. One of them was made the day after the indictment was filed with the District

Court clerk. The court erroneously allowed this hearsay against Weinstein although he was not present, apparently on the theory that the indictment charged a conspiracy to conceal the facts of the staged accidents; that, thus, the conspiracy continued uninterrupted on up to the time of the indictment. The court did not instruct the jury that concealment could not be an overt act and that the last overt act had to be no later than May 11, 1960.

Specification of Error No. VII:

Instructing, the court told the jury that proof concerning the accomplishment of the objects of a conspiracy is the most persuasive evidence of the existence of a conspiracy itself. The object of the alleged conspiracy was to obtain money from insurance companies. Money was obtained from insurance companies. Had the collisions herein been perfectly valid, under this instruction the defendants would have been guilty.

Specification of Error No. VIII:

The government called 84 witnesses. Weinstein 25, total 109. There were over 400 exhibits. The transcript of testimony exceeds 6,000 pages. The trial extended over a period of two months. The court told the jury that the case bristled with issues of veracity and that in instances too numerous to specify the testimony of witnesses called by the government is flatly contradicted by testimony of the defendants. It was possible, in one hour, only to skim lightly over the eight-week trial. By

limiting Weinstein to one hour, the court deprived him of his rights under the Sixth Amendment.

Specification of Error No. IX:

The evidence shows that the defendants who participated in the staged collisions were a local group of petty defrauders. The matter was strictly local in scope, involving the obtaining of money by false pretenses. The use of the mails was incidental and did not enter into the scheme. Federal prosecutions should not get involved in matters that are primarily of local concern.

ARGUMENT

SPECIFICATION OF ERROR NO. I

The Trial Court Erred in Denying Weinstein's Motions for Judgment of Acquittal.

Weinstein moved for a judgment of acquittal at the end of the government's case (XIX, 3682); and again at the end of all the evidence (XXIX, 5677); both were denied (XIX, 3711; XXIX, 5689). After the verdict, Weinstein filed a motion for judgment of acquittal (R. 101) and a new trial (R. 106). These motions were denied (R. 231).

There are three matters upon which the evidence cannot be doubted:

1. The mails were used (although very incidentally, and the use of the mails never entered into the contemplation of the defendants).

2. The collisions were staged. [This statement is made with a reservation as to the collision of August 16, 1958 (Counts VII and VIII). It is extremely doubtful that there was any sufficient evidence to show that this collision was not legitimate.]

3. Weinstein was acquainted with a number of the defendants and named conspirators; he represented a number of them; he paid sums of money to them by way of loans.

The issue is KNOWLEDGE. Did Weinstein KNOWINGLY participate in staged collisions—or was he, too, a victim? Was there sufficient evidence to submit to the jury on Weinstein's guilt, or should the court have granted the motion for judgment of acquittal?

There was no direct evidence of Weinstein's guilt. All evidence against Weinstein is circumstantial.

The rule for determining whether the trial court properly denied the motion for judgment of acquittal is stated as follows:

> "The test to be applied on motion for judgment of acquittal in such a case, however, is not whether in the trial court's opinion the evidence fails to exclude every hypothesis but guilt, but rather whether *as a matter of law* reasonable minds, as triers of the fact, *must* be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence * * * . If reasonable minds *could* find that the evidence excludes every reasonable hypothesis but that of guilt, the question is one of fact and must be submitted to the jury." *Cape* v. *United States* (CA 9), 283 F.2d 430, quoting from *Remmer* v. *United*

States, (CA 9), 205 F.2d, 277, 287. (Emphasis by the court).

The above rule has been stated several times in this circuit and elsewhere.

Weinstein contends that there was no *substantial* evidence of guilt; that all of the evidence was as consistent with innocence as with guilt; consequently, it was the duty of the trial judge to direct a judgment of acquittal for Weinstein.

In so saying, Weinstein recognizes that the evidence must be viewed in the light most favorable to the government. In reviewing the evidence, such will be done.

It is also recognized that on the question of a judgment of acquittal, the trial court could not weigh the evidence; that although the evidence adduced against Weinstein came almost exclusively from suspect and tainted sources generally unworthy of belief, nevertheless, all such testimony must be accepted as true and reliable *for this purpose.*

It is emphasized again that there is no direct evidence of any guilty involvement on the part of Weinstein. All evidence against Weinstein is circumstantial.

Out of the two months of trial, the chief claims against Weinstein were:

1. He represented, as attorney, a number of the people in the staged accidents.
2. He told the Deegans to exaggerate injuries and damages.

3. He paid money to some of the participants in the staged accidents.
4. He endorsed a draft and signed a release to the insurance company in settlement of the case for one of the participants in a staged accident.

A quick answer to these items is:

1. Representing persons with fraudulent claims can be done innocently; or it can be done with guilty knowledge.
2. Suggestions to clients to inflate injuries or damages can be for the purpose of building up a valid claim, as well as for other purposes.
3. Paying money to persons involved in accidents can be for loans, as well as for other purposes.
4. Signing a draft and a release for a client pursuant to a power of attorney can be and is a legal method of handling such matters; such is at least as likely an inference as is one of guilty knowledge of a fraudulent claim.

All possible identifiable claims against Weinstein under the evidence can be put under the following heads:

I. Weinstein had relationships of varying degrees with a number of the named defendants and and conspirators.

II. Weinstein paid large sums of money to some of the defendants, conspirators and other suspects.

III. George Barnard and other suspects told participants in staged accidents to see attorney Weinstein.

IV. George Barnard was a frequent visitor to his office.

V. George Barnard told the Deegans of the arrival of their settlement check from the insurance company.

VI. Defendants Knippel and Lasiter visited defendant Boisjolie following a telephone call to Weinstein from Boisjolie's "wife."

VII. Weinstein gave Deegan money to leave town at the time of the grand jury hearings.

VIII. Weinstein told Deegan to smash his car; feign and exaggerate injuries; recommended doctors who would be more favorable on injuries; told Deegan not to go back to work after his accident.

IX. Weinstein had no trouble finding defendant Giegerich for service by mail.

X. Weinstein questioned conspirator Rose about the facts of the accident.

XI. Weinstein simulated Saunders' signature and witnessed the same; the power of attorney.

Discussion of all of the above matters follows. All evidence will be viewed from the standpoint most favorable to the prosecution:

I

Weinstein's Representation Of, or Relation To, the Various Defendants and Conspirators.

A. Defendants

Defendant George James Barnard:

George Barnard appeared to be the leader of the staged accident group. He was the only defendant named in all nine counts of the indictment (R. 1).

Weinstein first met George Barnard February 1957 when Portland attorney, James Hafey, took Barnard to Weinstein's office. Hafey was Barnard's attorney. Hafey asked Weinstein to handle a case for Barnard inasmuch as Hafey had a conflict (XXII, 4314). Weinstein routinely filed and settled the case (XXIV, 4771).

January 1958, Barnard and Mrs. Barnard were involved in another collision. Weinstein filed complaints; the cases were settled September 1958 (XXIV, 4772).

February 1959, Barnard and Mrs. Barnard were involved in another collision. Weinstein did not file because he could not get a definite medical report. About a year later Mrs. Barnard became dissatisfied with Weinstein. The Barnards terminated Weinstein's representation and took the case to another lawyer (XXIV, 4772A-4775).

During this period of time, attorney Hafey continued also to represent the Barnards. He had two other matters for them during the same time Weinstein was representing them (XXII, 4316-4318).

There was no evidence that any of the above cases were improper.

Defendant Raymond Henry Knippel:

Prior to the time in question, Weinstein was consulted by Knippel concerning some minor business matters (XXVI, 5115).

January 17, 1959, Knippel was a passenger in a car owned and operated by conspirator Conrad Kerr. This car was struck in the rear by a car being operated by conspirator Alfred Wooldridge. This collision was not mentioned in any of the nine counts; evidence thereof was adduced in connection with the conspiracy count.

Knippel consulted Weinstein after the collision. Weinstein referred him to attorney Ben Gray (XXVI, 5116-5118).

Defendant William Mack Lasiter:

Weinstein represented Lasiter on property damage matters in 1958 and 1959. No claim was made that these were not legitimate (XXVI, 5073).

Defendant Darrel Wayne Saunders:

Saunders called Weinstein from Providence Hospital several days following the collision of September 11, 1958 (Count VI). Saunders had been put in a hospital room already occupied by Norman Fields, a long-time friend and client of Weinstein. At Saunders' request, Weinstein went to Providence Hospital (XXII, 4367-4372; XXIV, 4683-4685).

Weinstein represented Saunders and eventually settled his case for him (XXIV, 4711).

Defendant David Leon Boisjolie:

Weinstein represented Boisjolie's first wife (Joyce) and their two small daughters for injuries received in a collision in November 1958. He also represented Boisjolie on his claim for loss of consortium. Boisjolie testified it was an honest collision.

Weinstein also represented Boisjolie when his first wife (Joyce) sued Boisjolie for divorce in 1959. In all, Boisjolie was in Weinstein's office four or five times in connection with the divorce (VI, 1183; VII, 1295).

Defendants Leland Arthur Deegan and Geraldine Ruth Deegan, husband and wife:

The Deegans contacted Weinstein the day after their collision of September 11, 1958 (Count VI). The Deegans said George Barnard told them to see Weinstein (II, 253; IV, 674). Mrs. Deegan had been recommended to Weinstein earlier in the year by Irene Blair, a satisfied client of Weinstein. Mrs. Blair was a cook where Mrs. Deegan was a waitress (IV, 707, 708; XXIII, 4561-4565).

Weinstein filed actions for the Deegans and eventually settled their cases (II, 273).

Defendant Ronald Eugene Allison:

Allison drove the vehicle that was struck August 18, 1958 (Counts VII and VIII) (Ex. 431). Allison was hospitalized in Providence Hospital. An occupant of his

room was Elston Adams, a client of Weinstein. He recommended Weinstein to Allison (XXII, 4343, XXIV, 4750).

Weinstein was also recommended from another source. Allison's wife was a bank clerk. Robert Huffman, executive vice-president of Logan Oldsmobile, a large car dealer in Portland, did his banking at the bank where Mrs. Allison worked. She asked Huffman about a lawyer. She was having the Allison car fixed at Logan Oldsmobile following the collision. Huffman recommended Weinstein. Huffman had known Weinstein for a number of years and Weinstein had done legal work for him (XIV, 2630; XXIII, 4555-4560; XXVII, 5228, 5232).

Weinstein filed an action for Allison against defendant Giegerich and Wolfard Motor Co. and eventually settled the matter (Ex. 81; XIV, 2630, 2631).

Defendant John Norris Barnard:

Defendant John Barnard was a passenger in the Allison car at the time it was hit (Counts VII and VIII).

John Barnard and George Barnard were brothers. Weinstein came to know and represent them at different times and through different sources. He did not know they were brothers for sometime (XXIV, 4770).

About 1956, John Barnard was injured as an employee of Ross Island Sand & Gravel Company (XXIV, 4741). John Barnard asked Edward T. Mayes, a fellow employee, to recommend a lawyer. Weinstein had handled several cases for Mayes. Mayes recommended Weinstein (XXII, 4358-4363).

Barbara Barnard, wife of John Barnard, was later a client of Weinstein also. She was injured in a fall as an employee of S. H. Kress Co. in 1957. The insurance carrier stopped her compensation payments so she consulted Weinstein. The matter was settled in 1959 (XXIII' 4586-4589).

Thereafter, Barnard received another injury as an employee of Ross Island and brought an action against Ross Island. Weinstein represented him again (XXIV, 4743). This last case was settled May 1958 (XXIV, 4602), just a few months before the collision of August 18, 1958 (Counts VII and VIII).

No question was raised as to the legitimacy of any of these three claims.

Barnard went to Weinstein again after the August 18, 1958, collision.

Weinstein filed an action for John Barnard against defendant Giegerich and Wolfard Motor Co. at the same time he filed the action for Allision; it was settled (Ex. 82, XIV, 2631).

Defendants Arthur Roscoe Smith and Larry Warren Haynes:

These defendants were involved in Counts I and II. Both were government witnesses on guilty pleas. Both denied all knowledge of Weinstein (XV, 2843; XVIII, 3465).

Defendants Patricia Ann DePlois, Donald William Johnstone, and Charles Harry Giegerich:

Weinstein had no connection with any of the above three.

Defendants DePlois and Johnstone were the drivers of the two vehicles involved in the collision giving rise to Count III.

Giegerich drove the vehicle which struck the Allison vehicle August 18, 1958 (Counts VII and VIII) (Ex. 431). Weinstein brought an action against Giegerich and Wolfard Motor Co. on behalf of John Barnard, Allison and Page (Exs. 81, 82, 83).

B. Conspirators Named in Indictment (Count IX)

Conspirators Ronald A. Miller, and Dennis Dunham:

Miller and Dunham were occupants of the car that was hit October 16, 1958 (Counts IV and V) (VI, 1054). They did not testify.

Originally they saw Weinstein. Shortly thereafter, attorney Ben Gray became their counsel upon referral of Weinstein (XXIV, 4717-4720).

Conspirator Gordon L. McCoy:

McCoy was another passenger in the vehicle which was struck October 16, 1958 (Counts IV and V). He was a government witness. He testified that George Barnard handed him Weinstein's card shortly before the

collision and told him to see Weinstein, (this is discussed infra, part III, this Specification).

Like Miller and Dunham, he was originally represented by Weinstein. Shortly after, he became a client of attorney Ben Gray, who filed an action for him (IX, 1677; XXIV, 4717; Ex. 27).

Conspirator Esther Howerton:

Mrs. Howerton was owner and occupant of the car that hit the Deegan car September 11, 1958 (Count VI). Defendant Boisjolie drove the car. She testified as a government witness (V, 845-850). She was in Weinstein's office once to talk about Boisjolie's divorce (V, 857).

Conspirator James W. Page:

Page was the third occupant of the Allison car (Counts VII and VIII). Page was hospitalized in Providence Hospital along with Allison in the same room occupied by Elston Adams, a former client of Weinstein. Adams recommended Weinstein. Weinstein represented Page, filed an action for him which was eventually settled (Ex. 83; XXIV, 4750, 4751).

Conspirators Richard Sanseri, Donovan S. McCoy, Ann L. Kimmel (Stewart) and Lewis Swertfeger (Scott):

Sanseri testified as a government witness that he did not know Weinstein (XV, 2907). Donovan McCoy did not mention Weinstein. Both were involved in Counts I and II.

Kimmel (Stewart) testified as a government witness

that she did not know Weinstein (X, 1960). She was involved in Count III.

Swertfeger (Scott) testified as a government witness. He was the striking driver of the car in Counts IV and V (Exs. 27, 28, 29, 30). There was no indication he knew Weinstein.

C. Conspirators Named Only in Answer to Weinstein's Request for Bill of Particulars

The indictment alleged that there were "unknown" conspirators (R. 7). Weinstein sought the names, and in answer thereto the government furnished the following additionally named persons (R. 73):

Conspirator James F. Barnard:

James Barnard (this is a third Barnard) was a passenger in the car that was struck January 17, 1959 (XVII, 3222). This collision is not mentioned in the indictment. He was not called as a witness.

Conspirator Conrad Kerr:

Kerr was the driver of the vehicle that was hit January 17, 1959. Kerr testified as a government witness (XVII, 3222). He testified he did not know about the collision being staged (XVII, 3248). He called Weinstein from the hospital, but Weinstein did not see him. Weinstein referred him to attorney Ben Gray. Kerr came to see Weinstein at his office several times (XVII, 3224, 3267).

Conspirator Alfred Wooldridge:

Weinstein represented Wooldridge in connection with a collision December 6, 1958. Wooldridge, a government witness, testified it was a legitimate collision (XVI, 3157).

Wooldridge left town before Weinstein filed a complaint and never returned. He dropped out of sight (XXV, 4867-4869).

Wooldridge was the driver of the car that struck the Kerr car January 17, 1959 (XVI, 3113).

Conspirator Catherine Barnard:

This is apparently Mrs. George Barnard. She did not testify. Weinstein represented her, along with George Barnard, in an accident in 1958 and another in 1959, which eventually was taken away from Weinstein at her insistence (XXIV, 4772-4775).

Conspirator Keith I. Rose:

Rose drove the car which was struck October 16, 1958 (Counts IV and V). Rose testified for the government.

Rose said that Weinstein came to see him at the hospital and told Rose that the other boys (McCoy, Dunham and Miller) were represented by him and wondered if Rose wanted him (IX, 1755). He said Weinstein also wanted to talk to him because Rose was the driver (X, 1841).

Weinstein referred Rose along with the other occupants of Rose's car to attorney Ben Gray (X, 1844).

Gray filed action for Rose (Ex. 29). His case against Swertfeger was tried in circuit court, resulting in a judgment for Rose. (X, 1852).

The foregoing summary covers all defendants, conspirators named in the indictment, and conspirators named in the bill of particulars. Certainly there is nothing in the foregoing that would be considered substantial evidence of guilty knowledge on the part of Weinstein. Representation of bad men has not come to be an indication of guilt on the part of the attorney. Nor is the fact that a bad man recommends an attorney evidence that the attorney himself is a bad man.

II

Weinstein Paid Large Sums of Money to a Number of Defendants, Conspirators and Other Suspects.

The fact that Weinstein paid out money to a number of the persons named as defendants and conspirators gave rise to a government attempt to show that Weinstein had guilty knowledge. The government attempted to show that Weinstein was the "pay-off" man.

Each individual case will be taken up where any money was ever paid. It will be noted that *every payment was either a loan or in final settlement of a lawsuit or claim.*

Weinstein called two well-qualified Portland attorneys as expert witnesses. Attorneys Nels Peterson and John Ryan testified that it had been the approved cus-

tom for many years among Portland attorneys having personal injury cases to advance sums of money to their clients prior to settlement or judgment, (XXIV, 4645; XXV, 4930). *There was no evidence to the contrary.*

The following named persons are all those to whom Weinstein paid any sum of money:

Defendants Leland and Geraldine Deegan:

Weinstein loaned the Deegans money all during the time their cases were pending. In addition, he paid a number of traffic fines for Deegan. Weinstein also paid their doctor and hospital bills, and advanced the costs of filing, All of these amounts were deductcd after the Deegan cases were settled with the insurance company for $3,750. The amounts advanced, together with the cash paid at the time of the settlement, amounted to over $2,600 for the Deegans. The remainder was for the attorney fee (contingent), less than one-third. Deegan referred to the various amounts paid by Weinstein as "loans", and they were treated as such (III, 465-472).

There was nothing in the testimony of either of the Deegans to indicate that there was any "pay-off". Actually, Weinstein treated the Deegans very kindly.

Considering the government's theory that Weinstein was the "pay-off" man and that the Deegans were the principal witnesses for the government against Weinstein, Mr. Deegan's testimony is significant.

Defendant David Leon Boisjolie:

This man started early to cooperate with the gov-

ernment, although he was named as a defendant. He signed a confession October 10, 1960 (VI, 1187). He was a prime government witness.

Boisjolie and his first wife (Joyce) borrowed money from Weinstein in connection with her accident of November 1958, in which she and their two small daughters were injured. It was all repaid on settlement of the case (VII, 1353, 1354). Boisjolie testified it was a legitimate accident (VII, 1290).

One other check was given by Weinstein to Boisjolie. This was developed in a most significant manner by the government. The government put in evidence a photostat of a Weinstein check for $210 to Boisjolie dated September 27, 1960 (Ex. 32-D; VII, 1359-1363). The government also put in evidence that just two weeks later it had been suggested to Boisjolie that he *obtain money from Weinstein* so he could leave town for the heat was on (VII, 1206-1209, 1373-1375; see Specification of Error No. VI, infra 120).

But on cross-examination, Boisjolie admitted that the check (Ex. 32-D) was given to him by Weinstein at his request *as a loan* to buy necessities for his two daughters who had been left with him by his former wife Joyce, and to make a payment on some furniture, and for no other purpose. He signed a note for the $210 at the same time (Ex. 416-B; VII, 1297, 1298, 1364, 1365). Weinstein then put the original check for $210 into evidence (Ex. 416-A).

Boisjolie's admission is most revealing. *The government built much of its case around Boisjolie. It used*

him in getting the sham indictment of Deegan for intimidation of Boisjolie several days before the trial (R. Vol II, 242). This indictment with attendant incarceration and circumstances was used to coerce a confession out of Deegan (see Specification of Error No. III, infra 88). *Thus, the importance of the admission by Boisjolie that the check* (Exs. 32-D; 416-A) was a *perfectly innocent and legitimate loan by Weinstein for humanitarian purposes, rather than something bad and sinister, cannot be overemphasized.* The build-up by the government all pointed toward a desired conclusion that Boisjolie got the $210 so he could leave town.

Viewing the above testimony in any light gives absolutely no encouragement to the government's theory that Weinstein was "pay-off" man for the group.

Conspirator Gordon L. McCoy:

On his second visit to Weinstein as a client, Gordon McCoy asked Weinstein to loan money to him; Weinstein asked him what he needed it for; McCoy said for a car payment; Weinstein did loan him money then and also on his next visit (VIII, 1593, IX, 1679).

Thereafter, Weinstein told McCoy and the other people in that collision (Counts IV and V) that he could not represent them and took them over to attorney Ben Gray. McCoy asked Gray to loan him money and Gray said to see Weinstein. At one time Weinstein loaned McCoy money for a traffic ticket of $20 (VIII, 1597; IX, 1680). Weinstein tried to slow McCoy down on borrowing; at one time told him he was having heavy

expenses because his son had had a stroke (IX, 1681). Weinstein's loans are shown by checks (Exs. 421-A - H). McCoy borrowed about $600 (IX, 1684).

On settlement of McCoy's case for $1,750 (IX, 1618), he paid back Weinstein *all of the money he had borrowed*. McCoy testified as follows:

> "Q And will you tell us what transpired on the occasion of that visit?
>
> A I was picking up the check for my settlement that Ben Gray had got, and I had to pay Mr. Weinstein back the money I borrowed from him." (VIII, 1600)
>
> * * * * *
>
> "Q But he continued to loan you money, didn't he?
>
> A Yes, he did.
>
> Q And you continued asking for it?
>
> A That is right.
>
> Q And then as I recall, that as soon as your case was settled with the insurance company, as part of the settlement that deducted from your share was the amount of money that Mr. Weinstein had loaned you?
>
> A That is correct" (IX, 1682).
>
> * * * * *
>
> "Q Did you have a genuine need for that money when he loaned it to you?
>
> A On a few occasions, yes.
>
> Q And you so indicated to him, didn't you?
>
> A Yes, I did." (IX, 1685)

This was another instance of a surly and hostile government witness over whom the government had complete control, who admitted that the money paid to him was entirely legitimate, innocent and for no ulterior purpose. The significance of his testimony on

the matter of loans cannot be overestimated in light of the direction the government attempted to point, and the type of witness involved.

Conspirator Keith I. Rose:

Rose borrowed money from Weinstein four or five times before Weinstein turned the case over to attorney Gray (IX, 1771). Rose borrowed money often. He had lots of bills (X, 1847, 1848). He borrowed about $380.

The money was all paid back on settlement of Rose's case (X, 1849, 1853). Rose testified as follows:

> "Q In connection with those loans, these checks here that the Bailiff has here that we have just been talking about, it was understood at the time those loans were made that the money was to be paid back, wasn't it?
>
> A Oh, yes, sir." (X, 1853)

Here is another hostile government witness who had no reason to give Weinstein a break and who had every reason to go along with the government investigators. Rose was at the mercy of the government. The fact that he failed to indicate the slightest irregularity concerning the payments is of utmost significance.

Defendant John Norris Barnard:

Prior to the collision of August 18, 1958 (Counts VII and VIII), Weinstein represented John Barnard on two cases against Ross Island Sand & Gravel Company. The last Ross Island case was settled May 1, 1958. Prior to settlement, Weinstein loaned John Barnard a substantial sum (XXIV, 4604; Exs. 150-A - D; 151-A - I). It was all repaid on settlement (XXIV, 4608).

John Barnard's wife, Barbara Barnard, was hurt in 1957 working at the S. H. Kress Company. She drew compensation through Liberty Mutual Insurance Company on a compensation agreement. Four months later the payments were stopped by Liberty Mutual. She went to Weinstein. An action was brought against Liberty Mutual which was finally settled in November 1959 (XXIII, 4586-4589; XXIV, 4767, 4768; Exs. 484, 495-A, B and C).

After John Barnard's Ross Island case was settled May 1, 1958 (see first paragraph above), Mrs. Barnard borrowed sums of money from Weinstein on four different occasions. She was sick, pregnant, and confined to her home. She asked Weinstein to make out the checks to her husband, which he did (XXIII, 4589-4598). The government put in photostats of three of these checks as part of its case (XVI, 3051; Exs. 108, 109, 110). Weinstein thereafter put in all four original checks. They are dated July 7, July 22, July 31 and August 8, 1958 (Exs. 485-A-D; XXIII, 4598).

There is no further testimoney concerning these four checks. It will be noted they were written subsequent to the settlement of the Ross Island case (May 1), and prior to the August 18 collision. The government theorized they were *prepayments* by Weinstein to Barnard on the collision of August 18, 1958 (Counts VII and VIII). The uncontradicted testimony is that the four checks were all for a proper and innocent purpose (XXIV, 4607, 4608; XXV, 4995). Such would have been a reasonable inference for a reasonable jury to draw.

Mrs. Barnard previously borrowed other sums from Weinstein also on her claim (XXIII, 4600; Ex. 149).

All sums borrowed by Barbara Barnard were paid back on settlement of her claim against Liberty Mutual Insurance Company in 1959 (XXIV, 4608).

Subsequent to the collision of August 18, 1958 (Counts VII and VIII), John Barnard started borrowing money again from Weinstein (Ex. 110-A-110-HH). Upon settlement, all sums borrowed were repaid to Weinstein and deducted from the amount received by John Barnard (XXVII, 5334).

The jury could have reasonably inferred that the amounts of money Weinstein paid to John and Barbara Barnard were for an innocent purpose—in fact, humanitarian. Barnard had four children. Both parents were out of work for months.

Conspirator Conrad Kerr:

Kerr was injured in the collision January 17, 1959. He asked Weinstein to represent him. Weinstein referred him to attorney Ben Gray. He borrowed from Weinstein four or five times while his claim was pending. Kerr testified as a government witness. He understood the money was a loan to be paid back when the case was settled and signed a note. Upon settlement of his case the full amount loaned by Weinstein to Kerr was repaid to Weinstein (XVII, 3226, 3269, 3270).

Defendant Darrel Wayne Saunders:

Saunders did not testify. The government put in no evidence concerning loans to Saunders.

Weinstein testified that he loaned Saunders $30 at Saunders' request when he visited him at the hospital September 17, 1958, shortly after the collision (Count VI) (XXIV, 4709).

Weinstein loaned Saunders about $1100. (XXVI, 5164). Saunders gave Weinstein a power of attorney (Ex. 488) which authorized Weinstein to settle the case against Esther Howerton and to repay himself from the settlement for the loans which he had made (XXIV, 4711). Settlement was made about March 15, 1960, and the entire amount of the loan was repaid along with the medical and other outstanding bills of Saunders (XXVI, 5164).

Defendant Ronald Eugene Allison:

Here again, as in the case of Saunders, the government put in no evidence concerning loans to Allison. Allison did not testify.

Starting September 13, 1958, periodic loans were made by Weinstein while Allison was not working until final settlement in October 1959 (Exs. 500-A-H; XXV, 4999; XXVI, 5003), at which time Allison received $2,810 (Ex. 500-I, J).

Conspirator Alfred Wooldridge:

Wooldridge testified as a government witness. He had been involved in a legitimate collision December 6, 1958. He went to Weinstein. On four occasions between December 18, 1958, and March 23, 1959, Wooldridge borrowed money from Weinstein (XVI, 3130, 3161; Exs. 443-A-D).

Wooldridge testified that all money that he borrowed was to be paid back when he settled the collision of December 6, 1958 (XVI, 3161). However, before any action was filed, Wooldridge left Portland, (XVI, 3173, 3174).

In the meantime, Wooldridge drove the vehicle January 17, 1959, which struck the Kerr automobile (XVI, 3122).

After he left Portland, Wooldridge called Weinstein from Cheyenne and told Weinstein he needed money—that he was getting married. Weinstein sent him $50 (XVI, 3134, 3135). After receiving the $50 in Cheyenne, Wooldridge never contacted Weinstein again (XVI, 3178).

The only reason that the Wooldridge loans were not repaid is because Wooldridge never signed the complaint. Weinstein had prepared the complaint (XXV, 4869; Ex. 497).

Defendant George James Barnard:

The government put in no evidence of loans to George Barnard in its case in chief. All evidence concerning such came from Weinstein.

Barnard and Mrs. Barnard were involved in a collision January 10, 1958. Weinstein, as their attorney, loaned Barnard money (Exs. 154, 155-A - J). This amount was all paid back to Weinstein when the case was settled later in the year (XXVI, 5172).

In early 1959, George Barnard and Mrs. Barnard

were involved in another collision. From March 6, 1959 to October 21, 1959, Weinstein made four loans to Barnard (Exs. 155-K - N). In February 1960, Mrs. Barnard became dissatisfied with Weinstein. The cases were taken out of Weinstein's office to another lawyer (XXIV, 4775). The cases were still pending at the time of trial. Consequently, Weinstein had not been repaid the loans as shown by Exhibits 155-K - N (XXVI, 5172).

A reasonable jury could reasonably find that all sums of money paid by Weinstein to George Barnard were paid pursuant to the prevalent practice in Portland at that time.

Defendant Raymond Henry Knippel:

Knippel did not testify. All testimony concerning loans to Knippel came from Weinstein.

Knippel had previously been a client of Weinstein (XXVI, 5115). Knippel came to Weinstein after the collision of January 17, 1959. Weinstein referred him to attorney Ben Gray (XXVI, 5118). When Knippel asked Gray for a loan, Gray sent him to Weinstein. Weinstein loaned money to Knippel on two occasions during the pendency of the matter (Exs. 158-A - B; XXVI, 5120). Knippel gave a note (XXVI, 5121). Upon settlement of Knippel's case with the insurance company, Knippel repaid the loan in full (XXVI, 5169).

Defendant William Mack Lasiter:

Lasiter did not testify. All testimony concerning Lasiter's finances came from Weinstein.

Weinstein represented Lasiter on a matter which was settled in March 1959. Lasiter recovered $2500. (Ex 159-A; XXVI, 5121).

In June 1959 Lasiter's car was damaged. Weinstein handled the claim and loaned Lasiter $200 pending settlement. Upon settlement Weinstein was repaid (XXVI, 5123, 5124; Ex. 159-B).

Government Witness Robert Perrin:

This subject of Weinstein's payment of sums of money to various defendants and conspirators cannot close without discussion of Robert Perrin. The trial proceeded during the months of September, October and November. Each month Perrin appeared as a government witness.

Perrin was an adjuster for Iowa National Insurance Company. Perrin testified in September as to the settlement with Weinstein of the claims of the Deegans and Saunders (Count VI) (VI, 1029).

In October Perrin made his second appearance. Perrin said that October 19, 1960, between 3:30 and 4:00 p.m., he met Weinstein in front of a specific building (XVI, 3002, 3003). Perrin said he and Weinstein were talking about attorney Herbert Black. Black was in the process of disbarment proceedings with the Oregon State Bar at the time (XVI, 3006). Perrin testified that Weinstein told him as follows:

> "Q Mr. Perrin, on the occasion of that meeting will you tell us what was said by Mr. Weinstein to you concerning himself?

A He told me, 'I am not an attorney, I am just a banker. You never saw a banker go to jail, did you? They will never get me. They will get some of the small fry in this matter, but they will never get me.' " (XVI, 3022).

In the first place, it is obvious that Weinstein could not have been referring to the indictment in this case. It was a secret indictment, not filed until January 20, 1961 (R. 1, 10; XVI, 3017).

The government's theory being what it was, certainly this was prejudicial testimony. Did this constitute evidence that Weinstein had knowledge that the collisions were being staged?

On cross-examination Perrin testified that he had been in the adjusting business for five years; that he had done more business with Weinstein than any other lawyer in the State of Oregon (XVI, 3030-3034). He and Weinstein had been kidding each other as they often did, and Perrin himself did not take Weinstein seriously, nor did he think that Weinstein was serious when he told him that he was a banker (XVI, 3034-3036):

"Q So, what Mr. Weinstein told you, you say he told you that he wasn't an attorney, you didn't take that seriously, did you?

A Honestly, it was just a general conversation, we were semi-kidding about the thing, that is correct.

Q That is what I thought. Mr. Weinstein is, when he talks to people, he tends to be quite jovial and joking at times, doesn't he?

A With me, yes." (XVI, 3034).

* * * * *

"Q And when Mr. Weinstein said he was a

banker, as you say, you didn't seriously think he was a banker, you didn't think he was seriously telling you that he was a banker, did you?

A No.

Q And when he said or words to this effect, 'That you never saw a banker go to jail, did you?' that was said in a rather joking tone of voice, wasn't it?

A Yes, it was." (XVI, 3035)

A reasonable jury could reasonably conclude that Weinstein was joking and kidding with Perrin, as Perrin himself so concluded. It is not evidence of any knowledge regarding staged collisions.

The foregoing covers the testimony concerning money paid by Weinstein to any person connected with the indictment. Looking at the testimony from the standpoint most favorable to the government, it is as reasonable to conclude that Weinstein was making legitimate loans to needy clients as to conclude Weinstein was aware of the improper nature of the collisions involved.

If further evidence concerning the propriety of loans to clients by attorneys is indicated, it is furnished by Exhibits 501-A - D.

Elston Adams was a client of Weinstein (XXIV, 4750). Needing money, Weinstein loaned him a total of $2,005 over a period of about a year and a half in small payments. Adams died just after his case was settled but before payment. Adams' estate was probated in Multnomah County Circuit Court. Adams' only asset was the settlement. Weinstein filed a claim for $2,005, set-

ting forth in detail exactly what it was for. *It was approved by the court and paid in full upon court order* XXV, 5000; XXVI, 5001 (XXVII, 5204-5206; Exs. 501-A - D). Attention is particularly invited to Exhibit 501-A.

III

George Barnard and Others Told Participants in Staged Collisions to See Weinstein.

There was considerable evidence that defendant George Barnard was the moving force setting up the staged collisions. There was hearsay testimony by several participants of staged collisions that George Barnard told them to retain Weinstein as their attorney.

Without independent evidence of Weinstein's participation, which there was not, such evidence was not admissible. — Barnard usually designated a doctor also. The testimony concerning this phase is as follows:

1. The Deegans both testified that Barnard told them to see Weinstein and Dr. Joe Davis following their collision (Count VI) (II, 253; IV, 674); Mrs. Deegan said Barnard told her arrangements had all been made with Dr. Joe Davis (IV, 606).

2. Conspirator Gordon McCoy testified that just before the collision (Counts IV and V), George Barnard gave to McCoy the business card of Weinstein and that of the Orthopedic & Fracture Clinic (Ex. 420; VIII, 1575; IX, 1659, 1660). Barnard told McCoy and the other three in this car that Dr. Davis and Dr. Cherry

(of the Orthopedic & Fracture Clinic) were in on it (IX, 1661-1663); that if they followed Dr. Cherry's instructions each would get $10,000 - $15,000 (IX, 1668).

As for the card of the Orthopedic & Fracture Clinic, McCoy had been carrying it around for three years up to the time he pulled it out of his billfold at the trial (IX, 1668). Dr. Joe Davis identified it as a card of the Orthopedic & Fracture Clinic (XXII, 4395).

Barnard told McCoy he was an ex-policeman with lots of connections; that he was top man; some of the biggest lawyers and doctors in Portland—biggest names in Portland were in on it; lots of people being paid off (VIII, 1557; IX, 1673).

3. Keith Rose testified that George Barnard told him and the other participants (Counts IV and V) "to see a certain Mr. Weinstein for an attorney after the accident" (IX, 1733). He also said that Barnard told each of them to see a certain doctor. Barnard told Rose to see "Dr. Davis". He also mentioned Dr. Cherry (IX, 1734; X, 1810, 1828).

Rose stated that Barnard told him before the collision (Counts IV and V) there was nothing to worry about, that the wreck was set up including doctors, lawyers and *hospitals* (IX, 1740; X, 1816, 1846).

4. Swertfeger testified that before the collision (Counts IV & V) George Barnard said that the doctors had been taken care of, and that Weinstein was to handle the case (VIII, 1422). In his statement to the government, he said that Barnard had told him the

insurance people, doctors, lawyers and policemen were all lined up. The only name he could remember of all these groups was Weinstein's (VIII, 1477).

5. Boisjolie testified that George Barnard told Esther Howerton the accident was all planned (Count VI); that the *hospitals knew they were coming along with the doctors;* that the syndicate had it fixed (VI, 1100; VII, 1268, 1273-1275). Boisjolie did not know which hospitals had been alerted in advance of the collision (VII, 1268).

6. Inspector Severtson testified that defendant Allison told him George Barnard had told Allison (double hearsay) that the *doctors, lawyers, hospitals, police* and *insurance* companies were all fixed up in connection with these accidents (XV, 2997, 2998).

7. George Barnard also told defendant Haynes (XV, 2842), Sanseri (XV, 2899), and Donovan McCoy (XVII, 3372) that the doctors and lawyers were all arranged. (Counts I and II in February 1960.) Different doctors (XV, 2843; XVII, 3372), lawyers (XV, 2903), and hospital (XV, 2852) were named.

Dr. Joe Davis and Dr. Howard Cherry are orthopedic specialists of the highest qualifications and reputation in the Portland area (XXII, 4380-4384; XXIII, 4427-4435, 4486-4490). Both doctors are beyond all suspicion. They perform much of their work for insurance companies and the State Industrial Accident Commission (XXIII, 4434, 4435). They are paid by insurance companies to treat and examine many Longshore patients

(XXIII, 4429). Dr. Cherry was also chairman and senior member of the Portland School Board.—Yet their Orthopedic & Fracture Clinic was recommended by George Barnard to over half of the defendants and conspirators! (See Appendix 170, Drs. Joe Davis, Cherry and Fitch.)

Like Weinstein, the Orthopedic & Fracture Clinic handled a large volume of business (XXIII, 4402).

Both doctors testified it would have been relatively easy for anyone to get hold of a number of their cards in the waiting room and other places (XXII, 4396, 4397; XXIII, 4496, 4497).

Mr. Deegan testified that George Barnard had told him never to tell Weinstein that he (Deegan) knew Barnard:

> "Q And at somewhere along the line didn't Mr. Barnard, Mr. George Barnard, tell you and your wife that you should not ever tell Phil Weinstein that you had been talking to him?
>
> A Yes.
>
> Q Isn't that right?
>
> A Just right there, right around the office, or something, yes.
>
> Q In other words, Mr. Barnard indicated to you and your wife that he didn't want you to tell Phil that you and your wife had been talking to him?
>
> A That is right." (III, 464)

Both Mr. and Mrs. Deegan also told this to their attorney, Ray Carskadon (XXVI, 5181, 5185).

A recommendation by someone like George Barnard is not tantamount to guilty knowledge. The prosecutor

appeared to agree that the recommendations did not implicate the doctors (XXIII, 4431).

It was logical for George Barnard to recommend Weinstein. Barnard knew Weinstein had a big personal injury business—that he was understaffed—that he got along with insurance adjusters—that he settled a lot of cases. (See Appendix 173-175, 182).

George Barnard would want a lawyer like that. One that would settle such cases fast, rather than expose them to the scrutiny of investigation, medical exams, depositions and trial. He would want a lawyer that handled a large volume of business so as not to attract attention of insurance companies or of the lawyer himself. He would want a lawyer who would get things done quickly without much investigation so that his actors, and he himself, could get out fast.

Exhibit 499 shows the volume of business that Weinstein did in eight months from July 1958 to February 1959. This covered the period of the four collisions involving Weinstein. During that eight-month period Weinstein took in 106 legitimate cases which eventually grossed over a quarter of a million dollars, and netted him in the neighborhood of $64,000 (XXV, 4894-4898).

It is significant, however, that of the four cases in which Weinstein was involved, there was not one fast settlement. All were filed in court; none were settled in less than a year; depositions and insurance medicals were taken in four collisions; one case was actually tried and won.

Contrast the fast settlements of Counts I and II (accident February 18, 1960 - settlement May 5, 1960) (Ex. 131), and Count III (collision September 5, 1959 - settlement December 2, 1959) (Ex. 80). No actions were filed, no depositions were taken, no insurance medical examinations given. Weinstein had nothing to do with either of these cases.

Weinstein obviously had nothing to hide—*no guilty knowledge*. The cases all got the full treatment before settlement.

IV

George Barnard Made Frequent Trips to Weinstein's Office.

Witness Carol Poole was Weinstein's secretary from December 1958 to July 1959 (VI, 1045). She testified that George Barnard was in Weinstein's office once or twice a week (VI, 1046).

This should not be surprising. Barnard was Weinstein's client, having been brought to Weinstein's office by attorney James Hafey. Thereafter, Weinstein handled several cases for Barnard (Part I, supra).

Obviously, a reasonable jury could reasonably find that visits to Weinstein's office by Barnard were in connection with Weinstein's representation of Barnard as attorney.

V

George Barnard Told the Deegans That Their Check Had Arrived.

Mrs. Deegan testified that they learned of the arrival of the settlement check in Weinstein's office from George Barnard (IV, 644). Recognizing that Barnard was a client in Weinstein's office and was there rather frequently (Part IV, supra), this is not surprising.

The Deegans testified (Part III, supra), that George Barnard told them never to tell Weinstein that they (the Deegans) knew Barnard or were talking to him (III, 464; XXVI, 5181, 5185).

The foregoing as clearly indicates innocence to a reasonable jury as it does guilty knowledge.

VI

Defendants Knippel and Lasiter Visited Defendant Boisjolie Followng a Telephone Call From Boisjolie's "Wife" to Weinstein.

The propriety of admitting this testimony is fully discussed (infra, Specification of Error No. VI). The admission was error.

Assume, however, that it was properly admitted. The testimony is all set forth in detail (infra 120-125). To briefly summarize, Boisjolie was taken by government investigators to the Federal Building. He told his "wife" Edith Thomas to call his lawyer. She called Weinstein. Shortly after, defendants Knippel and Lasiter came to

her home, told her to tell Boisjolie to keep quiet. Later they told Boisjolie to get money from Weinstein to leave town.

The implications the government desired to have drawn were:

1. That upon receiving the telephone call from Edith Thomas, Weinstein had called Knippel and Lasiter, who thereupon went to tell Boisjolie to leave town and keep quiet. — However, Boisjolie in his confession signed October 10, 1960, stated that Knippel and Lasiter had been to their house for the past several weeks, at least three or four times a week, trying to find out who had been contacting Boisjolie (VII, 1350, 1351).

2. That Boisjolie got money from Weinstein to leave town. — Of course, Weinstein had given Boisjolie a check (Ex. 34-D) just a few days before (September 27, 1960). However, Boisjolie admitted this was given to him by Weinstein as a requested loan for taking care of his children and making a payment on his furniture (supra 30).

Even if the testimony had been properly admitted, a reasonable jury could as easily have inferred innocence as guilty knowledge on the part of Weinstein.

VII

Weinstein Gave Deegan Money to Leave Town at the Time of the Grand Jury Hearings

Deegan testified that about August or September 1960, he went to Weinstein's office, mentioned that he had

talked to a postal inspector and was worried about Mrs. Deegan "telling something". He said Weinstein said to get her out of town; later he received money from him; thereafter the Deegans went to Seattle (II, 300, 301).

Government counsel then asked Deegan as follows:

"Q. Did you tell Mr. Weinstein or make any statement concerning the nature of the accident, as to whether it was unintentional or intentional, on the occasion of this conversation?

A. No.

Q. Did you at the time of your interview with Postal Inspector Severtson and City Detective Harvey, did you receive from them any statement which you repeated to Mr. Weinstein concerning the staging of the accident, do you understand the question?

A. No, no, no." (II, 302, 303)

On cross-examination Mr. Deegan testified as follows concerning his conversation with Weinstein:

"Q. And you said to the effect that he told you when Mr. Severtson talked to you that he was merely bluffing, or something to that effect?

A. Yes.

Q. At that time that you talked to Mr. Weinstein before you were called before the grand jury, did you tell Mr. Weinstein that this was not a legitimate accident, did you tell him at that time?

A. No, I didn't understand that, will you ask that again?

Q. I say, at the time that you called Mr. Weinstein and told him that you had been contacted by Mr. Severtson, did you tell him that this was not a legitimate accident, in fact?

A. No, I didn't, no, I didn't.

Q. All right, and then you were called before the grand jury and you denied everything there, you say?

A. Yes." (III, 480)

Deegan also testified as follows concerning Weinstein:

"Q. When you and your wife left Mr. Weinstein's office after having talked to him for some considerable time when you first saw him there, didn't your wife say to you, in effect, that she was convinced that Phil did not know that there was anything wrong with this accident, didn't that conversation take place?

A. She mentioned something to that, but I don't believe it was the first day or anything like that. It may have been the first day, I remember she said something pertaining to that, yes.

Q. Somewhere along the line?

A. Somewhere along the line." (III, 463, 464)

Deegan further gave the following very significant testimony:

"Q. Now, Mr. Deegan, you and I already discussed this conversation that I had in the presence of your attorneys with you and Mrs. Deegan in Mr. Carskadon's office on, I think, September 12, 1961, you remember that, of course?

A. Yes, I do.

Q. Let me ask you if it isn't a fact that at that time you told me in the presence of Mr. Carskadon and your wife and that your wife agreed that the only thing that you knew concerning Phil Weinstein in this entire case was that Mr. Barnard had suggested that he come up to see you or that you go up to see him?

A. Are you asking me?

Q. Wasn't that stated at that time by you and your wife in the presence of me and Mr. Carskadon?

A. I may have said that, but like I said, that I shouldn't have been talking to you in the first place.

Q. Well, we were very friendly up there?

A. We were friendly, yes.

Q. And we were just sitting there, standing around there talking, weren't we?

A. That is right.

Q. And your attorney was there and we were just talking back and forth about the facts of the case, weren't we?

A. That is right.

Q. And you were not under any compunction to talk to me, were you, as a matter of fact, didn't I ask you if you objected to talking to me?

A. I don't remember that, you may have.

Q. But you didn't feel under any pressure or stress, did you, as you were talking to me there in the presence of Mr. Carskadon?

A. No." (III, 472, 473)

As for Mrs. Deegan, she testified as follows on cross-examination concerning Mr. Weinstein's guilty knowledge:

"Q. Do you remember telling me in Mr. Carskadon's office at the time we were talking there you were convinced at the time you talked to Mr. Weinstein that he knew nothing about the facts of this accident?

A. Yes, I remember telling you that.

Q. And don't you remember telling me that at the time you left Mr. Weinstein's office with your husband after you first talked to Mr. Weinstein that you told your husband that at that time you were convinced that he did not know that it was not a legitimate accident?

A. Yes, I did." (IV, 709, 710)

The conversation just referred to above was with Weinstein's attorney in the office of Mr. and Mrs. Deegan's attorney and in the presence of their attorney. This conversation was September 12, 1961, the day prior to the commencement of this trial (IV, 709, 710).

In further reference to the conversation in Mr. Carskadon's office, Mrs. Deegan testified as follows:

"Q. Mrs. Deegan, do you recall telling me at the time in Mr. Carskadon's office on the 12th day of

> September of this year at this conversation we were talking about, substantially the following: That there was absolutely nothing as far as Phil Weinstein was concerned in this case and that you were convinced that the first he knew about it was last Saturday when you told him about it in his office?
> A. Yes." (IV, 718)

The court's attention is also invited to the testimony of Ray Carskadon, attorney for the Deegans (XXVI, 5180, 5181).

It is noteworthy that the government did not ask Mrs. Deegan anything about a loan from Weinstein for the purpose of going to Seattle, and she mentioned nothing concerning the matter—nor did she say anything about going to Seattle.

Mrs. Deegan signed the statement for the FBI just before the start of the trial as follows:

> "A. 'My husband and I did go to see Weinstein the following day and took down information concerning the accident.'
> Q. Go ahead.
> A. 'He did not indicate that he knew the accident was a phoney one, we did not tell him.' " (IV, 689)

Deegan, as Weinstein well knew, had been in much trouble with the law for years. Weinstein had represented him in connection with some of his troubles with the law and loaned him money to pay fines (Exs. 503-A-E; III, 467-470; XXVII, 5208-5210; XXIX, 5668). Weinstein had loaned Deegans much money during the pending of their law actions (III, 465-469).

An inference that any money Weinstein may have given Deegan was for a loan or for any one of a variety

of purposes was as reasonable a one to be drawn as that Weinstein gave money to Mr. Deegan by reason of guilty knowledge.

VIII

Weinstein Told Deegan to Smash His Car; Feign and Exaggerate Injuries; Recommended Doctors Who Would Be More Favorable on Injuries; Told Deegan Not to Go Back to Work After His Accident.

1. *Weinstein Told Deegan to Smash Up His Car*:

Leland Deegan testified as follows:

That shortly after the collision he met Weinstein at Providence Hospital; Weinstein saw Deegan's car, noted that it had no damage and told Deegan to bash it into a tree, which he did (II, 257, 258).

That the day after smashing up the car, Deegan talked to Weinstein and told Weinstein what he had done. Weinstein said to get rid of the car (II, 264).

That Deegan then immediately sold the car back to George Barnard (II, 263).

That at the time Weinstein told Deegan to get rid of the car, Weinstein was holding a photograph of the rear-end of the Deegan car which he showed to Deegan. It showed no damage to the Deegan car. It was Exhibit 5. Weinstein told Deegan he had bought Exhibit 5 from a photographer (II, 265, 266).

That at the time Deegan met Weinstein at Providence Hospital, the meeting first took place in Saunders' hospital room. Norman Fields was there as a patient in the same room (II, 255).

That is the end of Deegan's testimony on that point.

Initially, at this point, it should be observed that a jury could have as reasonably inferred from this narrative that Weinstein was trying to build up damages in a legitimate accident as to infer that Weinstein had guilty knowledge of a staged collision.

However, the following shows that Deegan's testimony is completely false:

(a) The Portland Police Department report on the Deegan collision clearly showed in two places that there was *no damage whatsoever to the Deegan's car* (Ex. 402; I, 174, 175). Anyone can buy or see a police report (I, 172; XXVII, 5218). Expert witnesses testified that a police report was almost invariably obtained and used by an attorney handling a personal injury case (XXIV, 4637; XXV, 4914; XXVII, 5218).

It is inconceivable that Weinstein, an experienced personal injury attorney, would direct Deegan to smash up the car when the police report showed there was no damage to the car!

(b) Al Allaway, a professional photographer of collisions in the Portland area, had a man on the scene that night who took flash pictures of the Deegan-Howerton cars (Exs. 4, 5, 403, 404). The police officer received the call at 11:14 p.m. (I, 156), and arrived at the collision scene at 11:18 p.m. (I, 157). Allaway's photographer arrived and took the pictures at 11:23 p.m. (I, 196; XXI, 4143).

Allaway found out about collisions by monitoring

police calls. In 1958, Allaway photographed about 55% of the collisions in Multnomah County (Portland area) (XXI, 4140, 4141). In 1958, Weinstein bought about 5% of the pictures ordered by all attorneys in the Portland area (XXI, 4141). Allaway sold to attorneys, insurance companies or any interested party (XXI, 4143).

The Deegan collision was September 11, 1958. Weinstein ordered the pictures September 22, 1958 (XXI, 4144, 4160). Allaway mailed the pictures to Weinstein on the 25th of September, 1958 (XXI, 4144, 4160). Exhibit 465 is a copy of the sales slip taken from Allaway's files showing mailing date. The earliest they could have arrived would have been September 26, 1958, although probably later than that (XXI, 4145; Ex. 465).

Consequently, *Weinstein could not have had the pictures until over two weeks after the collision.* It will be recalled that Deegan said that he saw the pictures *the day after* Weinstein told him to smash up the car, which was the day after the accident.

Here again, it is inconceivable that Weinstein, knowing that a great percentage of the vehicles involved in collisions were professionally photographed specifically for the purpose of showing what damage occurred, would direct Deegan to inflict damage to his car.

(c) Exhibit 502, a certified copy of a record of the Director of Motor Vehicles, shows that the Deegan car was not sold until November 21, 1958, and that it was sold to Edith Thomas (Boisjolie)—not to George Barnard two days after September 11, 1958, as Deegan testified he did on Weinstein's direction.

Taking the most favorable view of the testimony from the government's standpoint,, a jury could as reasonably conclude innocence as it could conclude guilty knowldege.

2. *Weinstein Recommended Doctors and Told Clients How to Fool Doctors:*

The Deegans testified that sometime after their collision, (Count VI), Weinstein expressed dissatisfaction with the medical reports of Dr. Joe Davis—told them to see Dr. Gregg Wood, and they would get better reports (II, 271; III, 436).

The Deegans went to Dr. Wood. Actually *a comparison of the reports of Dr. Wood* (Exs. 466, 468) *shows they are less favorable from a plaintiff's standpoint than the reports of Dr. Davis* (Exs. 467, 469).—Both doctors found muscle spasm, which is an objective finding (XXII, 4232, 4250, 4387).

The Deegans also testified that Weinstein told them to exaggerate their injuries when being examined by Dr. Wood; that on examination they should not wince in the event they were stuck with pins, and in bending they should not go the full distance, etc. (II, 295; IV, 617). Mrs. Deegan said she did restrict her movements to fool Dr. Wood, and thinks she fooled him (IV, 702-704).

Strangely enough, the reports and testimony of Dr. Davis (Exs. 467, 469; XXII, 4387, 4397, 4400) show that there *was* limitation of motion. *But Dr. Wood's reports* (Exs. 466, 468) *show no limitation of motion, except in one minor respect.* Dr. Wood testified that the Deegans' ability to bend and move was normal (XXII, 4230, 4248, 4250).

Obviously, all this adds up to nothing for the government. Assuming, however, that what the Deegans said is all true (as we must), a reasonable jury could reasonably infer that Weinstein was merely attempting to build up the damages in a legitimate accident. Certainly, a reasonable jury could as reasonably infer innocence as to infer guilty knowledge.

3. *Weinstein Told Deegan Not to Work*:

Mrs. Deegan testified Weinstein told her and Mr. Deegan to lay off work after the collision (Count VI) (IV, 615). Actually, Mrs. Deegan lost only one day of work (IV, 714).

As for Mr. Deegan, although Mrs. Deegan claimed he had worked for Georgia Pacific for about two weeks prior to the collision (IV, 747), he only worked three days (Ex. 486; XXIV, 4694, 4695, 4700). Prior to Georgia Pacific he had not worked at all (IV, 747). Exhibit 486 is the only withholding slip he had for all of 1958; his entire earnings for the year were $41.61 (XXIV, 4700, 4701). His collision did not occur until September 11, 1958. Apparently Deegan did not take much urging!

Here again, assuming the full truth of what the Deegans said, it is just as reasonable that Weinstein was attempting to build up damages as it is to conclude he had guilty knowledge.

IX

Weinstein Had No Difficulty in Finding Giegerich for Service by Mail

Weinstein brought action against defendant Giegerich and Wolfard Motor Co. for Allison, John Barnard and Page (Counts VII and VIII). It was necessary for Weinstein to serve the Director of Motor Vehicles under an Oregon statute as Giegerich was not in Oregon. Weinstein was required by statute to mail copies of summons and complaint to Giegerich. This Weinstein did at Giegerich's home address in California (XXVI, 5113, 5128).

The government has argued that inasmuch as Weinstein mailed such to Giegerich's address in California this had a sinister meaning.

Weinstein tried to serve Giegerich in Portland and received a "not found" return from the sheriff. He then called Mr. James Minor, the claim's manager for Fireman's Fund Insurance Company (the company that had the coverage and with whom Weinstein had negotiated for settlement), and asked him for Giegerich's address. Minor furnished it to him (XXVI, 5113, 5114).

Minor was one of the chief witnesses for the government (XIII, 2553, et seq.). If Weinstein's testimony had not been true, Minor undoubtedly would have been recalled by the government to so state, which he was not.

X

Weinstein's Remark to Rose Concerning the Collision

Conspirator Rose testified that one time when he was in Weinstein's office, Weinstein told him there was some talk about the accident being fixed (Counts IV and V), and asked Rose about it. Rose testified he agreed with Weinstein that no one would risk their neck for a little money (IX, 1769).

On cross-examination Rose testified:

> "Q. As I understand it, at some later time, some later trip that you made down to Mr. Weinstein's office, that he made some remark to you about how both of you figured or he figured or you figured that no one would be crazy enough to risk their necks for a little money or something to that effect?
>
> A. That is correct.
>
> Q. Did you agree with that?
>
> A. Yes.
>
> Q. I take it by that that you never indicated to him that there was ever anything phoney about this accident?
>
> A. No, sir; I did not." (X, 1844)

A reasonable jury could have reasonably inferred from this testimony that Weinstein had somehow heard some rumor and was checking up. This is a reasonable inference—as reasonable as would be the inference that the question resulted from guilty knowledge on the part of Weinstein.

There should be nothing surprising in connection with this episode. James Buell, attorney for the insurance company, who defended the cases for Swertfeger (VIII, 1505),

himself interrogated his own client Swertfeger under oath concerning the facts of the accident (VIII, 1454; Ex. 34-A). This is an unusual procedure. Thereafter, Buell and the insurance company settled the actions and claims against Swertfeger and defended him in court (VIII, 1507; IX, 1601).

XI

Weinstein Simulated Saunders' Signature, and Witnessed the Same; the Power of Attorney

Saunders was a passenger in the Deegan car at the time of the collision (Count VI). Thereafter, Saunders desired to leave Portland for an indefinite period. He gave a general power of attorney to his attorney, Weinstein, so the case which Weinstein had filed for him could be settled (Ex. 488).

When the cases of the Deegans and Saunders were settled with the insurance company about March 1, 1960, Saunders was gone. Weinstein attempted to locate Saunders for about two weeks. About March 16, 1960, Weinstein endorsed the draft for $2,250, signing the name of Saunders; he also executed the release by signing Saunders' name. He witnessed the signature of Saunders on the release. He also personally endorsed the draft, inasmuch as it was made out to Saunders and to Weinstein as Saunders' attorney (Exs. 18, 19). This was all done pursuant to the power of attorney. Weinstein signed the draft as nearly as he could as Saunders would have signed it.

The proceeds of the $2,250 settlement were used to pay the doctors, the hospital, the loan of about $1,100

from Weinstein, court costs, and attorneys' fees. Saunders had very little remaining after all of the foregoing were paid (XXIV, 4709-4710, 4732-4734; XXVI, 5163-5165).

Claude McLoud, manager of the Portland claims office for the insurance company, testified that the company did not know a power of attorney was being used for the purposes of settling the case, and that the company would not have settled on the basis of a power of attorney (V. 954).

Witness Perrin, the adjuster on the case, in his November appearance as a government witness (his third), testified that he did not know that Weinstein was signing the draft and the release for Saunders—that he did not know there was a power of attorney (XXIX, 5628). This testimony was given on rebuttal.

There was no claim that it was not a valid power of attorney.

The government made much concerning this matter. Nevertheless, the law is very clear that an attorney-in-fact, pursuant to a power of attorney, is fully authorized to execute a negotiable instrument by signing the name of the principal. He need not indicate in any way that he is signing pursuant to a power of attorney, rather than that it is being signed by the principal; the fact that he simulates the signature of the principal is of no consequence: *Kiekhoefer v. United States National Bank of Los Angeles,* 2 Cal. 2d 98, 39 P.2d 807; *Flat Top National Bank v. Parsons,* 90 W.Va. 51, 110 S.E. 491, 495; O.R.S. 71.019; 96 A.L.R. 1251; *Independence Indemnity Co. v. Grants*

Pass and Josephine Bank (CA 9), 29 F.2d 83; *Elliott v. Mutual Life Insurance Co.,* 185 Okla. 289, 91 P.2d, 746.

Thus, no reasonable jury could have drawn any reasonable inference from the foregoing testimony other than Weinstein was acting in accordance with his authorization. The jury could not draw an inference that any of the foregoing indicated guilty knowledge on the part of Weinstein.

In the foregoing, we have attempted to set forth all of the evidence that might be construed to be in any way adverse to Weinstein. We have viewed it most favorably to the government.

At page 15, supra, we set forth the rule for determining the sufficiency of the evidence as set forth in *Cape v. United States,* (CA 9) 283 F.2d 430.

The foregoing evidence—all that could be used against Weinstein—viewed most favorably to the government—does not exclude every reasonable hypotheses other than guilt. A reasonable jury could find hypotheses inconsistent with Weinstein's guilt. In fact, innocence is *just as reasonable a hypothesis as is guilt.*

The trial judge in overruling the motion for judgment of acquittal stated that the test is set forth in *Curley v. United States,* (CA, DC), 160 F.2d 229 as follows:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play of the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of the fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." (XIX, 3700)

This test set forth by the court is true enough, but it does not state how the court is to arrive at a conclusion whether or not there is sufficient evidence from which a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

Furthermore, what is said in *Curley* is not in harmony with a later case in the same jurisdiction, i.e., *Maryland & Virginia Milk Producers Ass'n v. United States* (CA, DC), 193 F.2d 907, where the court reversed Judge Alexander Holtzoff, who had relied solely on *Curley,* (90 F Supp 681, 684), stating that:

> "It is still the law that there can be no conviction of a crime on circumstantial evidence unless the only possible inference to be derived from it is that of guilt. There must be evidence which forecloses and makes impossible any other conclusion." (193 F.2d at 917 and citing among other cases, *Isbell v. United States* (CA 8), 277 F. 788).

Recently, some doubt has arisen in this court as to the true test to be applied in determining the sufficiency of the evidence. Up to then, the test has always been that set forth in *Cape,* supra.

In one of the latest cases in this court, *Sica v. United* States (CA 9), 325 F.2d, 831, in regard to the sufficiency of the evidence, the court cited *Castro v. United States* (CA 9), 323 F.2d, 683, and particularly footnotes 1 and 2 at page 684. These footnotes refer to two different tests, the first being the one used in *Foster v. United States* (CA 9), 318 F.2d 684, where the rule is stated as follows:

> "The question as to the sufficiency of either direct or circumstantial evidence is whether it is substantial, taking the view most favorable to the Government."

The other test mentioned (n.2) is the test set forth in *Remmer v. United States* (CA 9); 205 F.2d, 277, which is also the test set forth in *Cape,* supra, in *Bolen v. United States* (CA 9), 303 F.2d, 870, and *Stoppelli v. United States* (CA 9), 183 F.2d 391, and other cases.

One of the cases cited in support of the so-called "substantial evidence" rule bears special mention, i.e., *Elwert v. United States,* (CA 9), 231 F.2d, 929. There the statement was made: "Here there is no question that acts of evasion were done." Nevertheless, the court stated:

> "The trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence." (231 F.2d at 933)

Elwert is typical of many of the cases where the matter of the sufficiency of the evidence is assigned as error. Obviously, in *Elwert,* there was direct evidence of evasion. This is also true of many of the cases where the test is discussed. They are not, in fact, circumstantial evidence cases. An analysis of their facts shows that there was direct evidence of guilt. Therefore, it was not necessary to decide what the test should be.

Thus, there are what might appear to be two different rules for testing the sufficiency of the evidence in a criminal case.

The same dilemma faced the court in *Cuthbert v. United States,* (CA 5), 278 F.2d 220. In that case the two appellants and Birch went from Washington, D. C. to Texas. The appellants both had records of prior narcotics

violations. Birch was a narcotic user without a record. After the three persons had been in Texas and had crossed back and forth across the border several times, Birch bought some marijuana. He was observed buying it and it was found in his possession as he was leaving to return to Washington. Birch pled guilty. All three of the persons maintained that it was solely Birch's idea to buy the marijuana and that the two appellants had no knowledge of, and did not participate in, the purchase.

After considerable hesitation, the trial court concluded that he did not believe any of the defendants. In spite of their stories he found them guilty of conspiracy and the substantive counts. Acting as a jury, the court was, of course, entitled to believe or disbelieve the testimony of the defendants and could draw any reasonable inference from the other facts.

In holding that a judgment of acquittal should have been granted, Judge Hutcheson for the Circuit Court stated (224 of 278 F.2d):

> "It is true that in one or two cases, including one from this court, *McFarland v. United States,* 273 F2d 417, 419, courts have arguendo and as dicta undertaken to give the Holland opinion an entirely different and more far reaching effect. In McFarland's case, for instance, the court stated:
>
> > 'It is not necessary that the evidence be wholly inconsistent with every conclusion except that of guilt, provided the evidence is substantial enough to establish a case from which the jury may infer guilt beyond a reasonable doubt.'
>
> "We can certainly agree that whether the evidence by which guilt is sought to be established is circumstantial or direct, *if it is substantial enough to estab-*

lish a case from which the jury may infer guilt beyond a reasonable doubt, it is sufficient to take the case to the jury. We cannot and do not agree, however, that in arriving at a decision that, as matter of law, evidence is sufficient to take the case to the jury, it is not necessary that the evidence can reasonably be found to be consistent with the conclusion of guilt and wholly inconsistent with every other reasonable conclusion. On the contrary, we are of the clear opinion that in a case where the evidence relied on to establish guilt is entirely circumstantial, it is essential to a just decision by the district judge that the evidence makes out a fact case for the decision of the jury, that the court conclude, that the jury might reasonably find not only that the evidence is consistent with a finding of guilt but that it is not consistent with any other reasonable conclusion. If this is not so, a verdict of guilty beyond a reasonable doubt, based wholly on circumstantial evidence, though it keeps the promise of a fair trial to the ear, breaks it to the hope." (Emphasis supplied by the court.)

The *Holland* case mentioned above is *Holland v. United States,* 348 U.S. 121, 140. As Judge Hutcheson points out, what was said in *Holland* as to circumstantial evidence excluding every reasonable hypothesis other than that of guilt related to the propriety of a jury instruction —not the test as to the sufficiency of the evidence to be applied by the court.

The detailed reasoning and logic of Judge Hutcheson is particularly appropriate because the facts he had before him in *Cuthbert,* supra, are almost identical with those before this court in *Doherty v. United States* (CA 9), 318 F.2d 719, also a case tried without a jury. There, too, the parties testified that the appellant did not know of the marijuana which was secreted in the car in which he

was riding. As this court stated: "The trial court was not required to accept their testimony". But, in reversing, this court observed that it was still necessary "for the Government to produce direct or circumstantial evidence of sufficient substance to warrant a finding of knowledge and participation" and that evidence which "may give rise to suspicion and speculation . . . is not enough." (318 F.2d, 719, 720.)

Support for the proposition that there is more than one rule is contained in the article of Professor Abraham S. Goldstein in 69 The Yale Law Journal, 1149, entitled, "The State and the Accused: Balance of Advantage in Criminal Procedure", and also in the note in 55 Columbia Law Review, 549, (1955) both referred to by this court in *Castro,* supra. Particular reference is made to Professor Goldstein's analysis of the rules of the sufficiency of the evidence (pp. 1152-1163). Professor Goldstein urges that the presumption of innocence and the requirement of proof beyond a reasonable doubt should be treated as something more than a jury instruction. Otherwise, as he states, there will be a risk of convicting an innocent person—exactly what Weinstein submits, happened here.

The note in 55 Columbia Law Review states that there are two rules "the substantial evidence rule" and the "circumstantial evidence rule", the latter being that set forth in *Cape, Stoppelli,* and *Remmer*. The note is careful to define what is meant by the circumstantial evidence rule, i.e., it is the classic rule taken from *Isbell* (CA 8), 227 F. 788, and repeated in substance, by this court in *Cape, Stoppelli, Remmer,* and *Bolen,* among other cases.

Nowhere, however, does the article define exactly what is meant by the "substantial evidence rule".

Turning to fundamentals, in *Isbell,* supra, the court says that the question to decide is whether or not there is "substantial evidence". The court then goes on to mention the presumption of innocence and proof beyond a reasonable doubt. It then states:

> "If there is, at the conclusion of a trial, no substantial evidence of facts which exclude every other hypothesis but that of guilt, there is no substantial evidence of the guilt of the accused, for facts consistent with his innocence are never evidence of his guilt." (227 F. at 792)

Professor Goldstein, in his Law Review article, equates the so-called "substantial evidence rule" with the so-called "rule of the Second Circuit" which is referred to and criticized in *Riggs v. United States,* (CA 5) 280 F.2d, 949, 953-955.

In this regard, we refer to the learned discourse on the entire subject of the quantum of evidence necessary in a circumstantial evidence case contained in Judge Jerome Frank's concurring opinion in *United States v. Masiello,* (CA 2), 235 F.2d, 279, 285. Judge Frank analyzes the functions of the court and the jury in a criminal case. As he states, it is necessary to distinguish between two different kinds of inferences. A testimonial inference, is one where a witness has testified to the occurrence of a fact. As he states, it rests entirely on the jury's belief in the credibility of the witness as to the occurrence of such fact. This is often referred to as "direct evidence". He differentiates this from the situation where from one or more

testimonial inferences (direct evidence), further inferences as to the occurrence of other facts may be drawn. He refers to the latter inferences as "derivative inferences" or indirect proof of facts concerning which no one has testified. As Judge Frank states, derivative inferences do not involve an evaluation of credibility.

Judge Frank further concludes that if the presumption of innocence and the requirement of proof beyond a reasonable doubt are to mean anything, then the occurrence of the derivatively-inferred facts must be much more probable than their non-occurrence.

Therefore, under the reasoning of Judge Frank, for the trial judge to have submitted this case to the jury, it would have had to be much more probable that the moneys paid by Weinstein to the guilty participants were not loans; that his representation of the staged-accidents participants was with knowledge of their false claims; and that the inference of guilty knowledge and participation was much more probable than the inference of innocence.

Judge Frank's logic is irrefutable. Even the Second Circuit itself, in two recent cases [*United States v. Lefkowitz,* (CA 2) 284 F.2d 310, 315 and *United States v. Monica,* (CA 2), 295 F.2d 400, 401], cites with approval Judge Hutcheson's opinion in the *Cuthbert* case (supra, 278 F.2d 220), indicating that even that circuit may be receding from its rule that the test of the sufficiency of the evidence in a criminal case is no different than in a civil case.

In this brief, reference has been made repeatedly to

"circumstantial evidence." This should not be taken as a criticism of circumstantial evidence or the reliability thereof, as such. In many, if not most, cases circumstantial evidence, if it points in the right direction, is as reliable as, if not more reliable than, "direct evidence."

The key question here, of course, is: Did Weinstein have knowledge that the collisions were staged?

In the case of *Ingram v. United States,* 360 U.S. 672, certain bookmakers and their full-time employees were convicted of conspiracy to evade payment of the gambling tax. Two of the full-time employees had full access to all of the facts as to whether or not the gambling tax had been paid. There was no direct evidence of the fact that these employees knew that the tax had not been paid. The government relied on circumstantial evidence to the effect that the employees were intimately connected with the operation of the lottery, they cooperated in conducting it secretly, and to their knowledge it was conducted at a profit. However, the Supreme Court reversed conviction of these two full-time employees because:

> " '* * * to establish the intent, the evidence of knowledge must be clear, not equivocal . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes.' " 360 U.S. at 680).

All evidence of knowledge was circumstantial. As stated by the court at page 678:

> "* * *. The record is completely barren of any *direct* evidence of such knowledge." (Emphasis added.)

So too with Weinstein—the record is completely barren of any direct evidence of guilty knowledge.

Another recent case which illustrates the fact that close association with guilty parties and the opportunity to obtain guilty knowledge is not sufficient to warrant a conviction is that of *Milam v. United States,* (CA 5), 322 F.2d 104. There Milam was an attorney for a corporation involved in a mail fraud operation. He formed the company, did all its legal work, was paid a retainer, traveled with its guilty officers and employees, was paid with checks fraudulently negotiated, etc. This was held to be insufficient evidence of guilty knowledge and a judgment of acquittal was ordered even though no motion had been made at the close of all of the evidence.

For a similar case in this Circuit, where there were a large number of suspicious circumstances, including association, the payment of money, etc., see *Lee v. United States,* (CA 9) 245 F.2d 322. There the court held that the evidence was insufficient.

Another recent case stating this rule for which Weinstein contends is *United States v. Saunders,* (CA 6) 325 F.2d 840, where the court states that:

> "Evidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal." (325 F.2d at 843)

However, if this court means to indicate that "substantial evidence" means no more than the "rule of the Second Circuit", and the same rules of sufficiency apply as in a civil case, then *Fegles Const. Co. v. McLaughlin Const.*

Co., (CA 9) 205 F.2d 637, would apply. There the appellants contended that the evidence was circumstantial and is "subject to the rule that if the conclusion reached from the facts in the chain of circumstances is equally consonant with the issues to be proven and with some other theory or theories inconsistent therewith, it becomes a mere conjecture, and the rule of the burden of proof is not satisfied. * * *." In regard to such assertion, this court said that "This is a correct statement of the law, not only in Montana, but in most, if not all, jurisdictions."

The same matter is illustrated by Professor Wigmore's analysis (relating to *civil* cases) as to the sufficiency of the evidence. [See Wigmore, Evidence Vol. IX, § 2494 (3rd. Ed.).] After discussing the difficulty in arriving at any fixed tests in a civil case, he summarizes the matter as follows:

> "Perhaps the best statement of the test is this: '[The proposition] cannot merely be, Is there evidence? . . . The proposition seems to me to be this: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?' "

As Wigmore states in a footnote (17) after quoting the foregoing from an English case:

> "There is also a subordinate rule, elaborated in many cases, holding that where from the same set of circumstances *either of two conclusions* may be drawn, whether the conclusions are consistent or are opposed, the case need not be submitted to the jury: * * *" (Wigmore's emphasis).

Obviously, "substantial evidence" cannot mean any less than the civil rule. As we have painstakingly shown,

in the case of Weinstein the inferences of innocence are just as strong as the inferences of guilt.

The situation of Weinstein was an unenviable one. He was thrown into a maelstrom of vague charges along with fourteen other persons, many of them his clients, or former clients, and concerning many of whom there is little doubt as to their guilt.

The Second Circuit Court of Appeals in the rather celebrated "Apalachin case" in many ways faced a like situation to that which Weinstein faced. There the Court of Appeals reversed the trial court, stating in part as follows [*United States v. Bufalino,* (CA 2) 285 F.2d 408, 417]:

> "Courts have long indulged in the somewhat naive supposition that jurors can properly assess such evidence and determine from it the individual guilt of each of many defendants, even when aided by a careful summary of the evidence such as Judge Kaufman gave here. *This makes it especially important for the trial and appellate courts to determine the sufficiency of the evidence as to each defendant in mass conspiracy trials.*"
>
> * * * * *
>
> (p 419)
>
> "But bad as many of these alleged conspirators may be, their conviction for a crime which the government could not prove, *on inferences no more valid than others equally supported by reason and experience,* and on evidence which a jury could not properly assess, cannot be permitted to stand." (Emphasis added.)

We have exhaustively set forth every bit of evidence and argument we can conceive that could possibly be used by the government to show guilt on the part of Wein-

stein. We have also used every argument that we can recall the government has ever used itself during the course of this proceeding in order to show guilt on the part of Weinstein. If there is further evidence which the government feels reflects upon the guilt of Weinstein, we assume that the government will specifically set it forth in its answering brief. We have searched the record and our recollection and can recall nothing further.

All that we have found falls far short under the rule of any Circuit, including the Second Circuit (civil case), of being sufficient evidence for the trial judge to have submitted the matter to the jury. A reading of the record indicates that the trial judge had a misconception concerning his duty and the jury's duty (XIX, 3700).

SPECIFICATION OF ERROR NO. II

The Trial Court Erred in Denying Weinstein's Motion for Separate Trial

A. The Court Abused Its Discretion in not Allowing Weinstein's Motions for a Separate Trial.

Defendant Weinstein filed a motion for separate trial February 20, 1961 (R. 14-20).

In his motion, Weinstein noted that he was named in only Counts VI, VII, VIII and IX; that by the end of the testimony the jury would be unable to distinguish between what came in concerning the first five counts and what came in concerning the others; that many of the defendants had unsavory backgrounds and criminal convictions (See Exs. 503-A-E for five convictions of fel-

low defendant Leland Deegan, as an example); that he would be branded with guilt by association; that he was a duly licensed and practicing attorney and had been for over 20 years, with a good reputation; that he would be particularly vulnerable in the minds of the jurors if staged accidents were proven on the part of any of the defendants, because the jury would rationalize *there had to be a lawyer to handle the claims and actions.*

Weinstein's motion for separate trial was denied (R. 211). On September 12, 1961, just before commencement of the trial, Weinstein again moved for a separate trial (R. 80). This motion was denied (I, 37).

At the end of the government's evidence, Weinstein again renewed his motion for separate trial (XIX, 3686). The motion was denied (XIX, 3722).

At the end of all of the evidence, Weinstein renewed his motion for a separate trial as follows:

> "The defendant Weinstein renews his motion for a separate trial on the grounds that it amply demonstrated that it is impossible for him to obtain a fair trial in a mass trial such as we have had in this case." (XXIX, 5680)

Motion denied (XXIX, 5689).

The first ground of Weinstein's motion for a new trial was that he should have been granted a separate trial (R. 105). This was denied (R. 231).

Guilt cannot, and must not, be inferred from association:

> *Evans* v. *United States,* 257 F.2d 121, 126 (CA 9)
> *Ong Way Jong* v. *United States,* 245 F.2d 392, 394 (CA 9)

Brumbelow v. *United States,* 323 F.2d 703, 705 (CA 10)

However, as pointed out by Mr. Justice Jackson in his well cited concurring opinion in *Krulewitch* v. *United States,* 336 U.S. 440, 454:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that *birds of a feather are flocked together.* * * * ." (Emphasis added.)

From the beginning, Weinstein recognized this problem. He had represented, as attorney, many of the other defendants.

Not only that, but as an attorney, he loaned money to his clients, which helped them to keep going during the pendency of their cases. The government construed these acts of kindness and prudence, which was proper and legitimate, to be something highly sinister.

The unfairness, except in rare instances, of trying any attorney with a group of disreputable people whom he has represented, appears undeniable.

The United States Supreme Court has made it clear in a series of recent decisions that every accused, however undesirable, is entitled to full representation by counsel almost from the moment he is taken into custody, and from then on, through the courts, including the appellate courts.

A large segment of the bar shudders at the very

thought of representing clients such as were Weinstein's co-defendants and former clients herein. On the other hand, there are some lawyers who are particularly adept at representing down-and-outers, the unfortunate, the unlucky, the accident prone, and the downright vicious. These lawyers are a necessity and are performing a great service. They are to be encouraged. Any such lawyer worth his salt in the representation of a client will often get into the matter so thoroughly that he will know the intimate and minute facts better than the client. This often calls for close association not only with the client, but on many occasions, with the client's cohorts.

What are we doing to the concept of full representation when the implied threat is held over these attorneys that some day they may find themselves sitting in the same dock with their clients?

On the occasion of the celebration of the golden anniversary of the Harvard Legal Aid Bureau in 1963, Mr. Justice Brennan gave the main address as reported in *Occasional Pamphlet Number Seven,* Harvard Law School, 1963. Justice Brennan urged law students not to all flock to corporate and business practices. He called on the law school to consider something in the nature of a law internship, to give students the basic experience of helping "confused and living little people." He decried the lack of able lawyers in criminal practice and emphasized the need therefor. At pages 20 and 21, Justice Brennan stated as follows:

> "For one thing, the fact that many criminal defendants may not be very nice people, people you might not like to associate with at the dinner table,

does not mean that their cases are not sometimes fascinating vehicles for the making of important law.

* * * * *

" * * * Today's leaders of the bar too seldom show that attitude; the tradition seems to have lost caste with too many of our profession. * * * I don't doubt that the relatively greater financial return in those specialties plays a large part in the choice, but if the law schools, and particularly the major ones, give only cursory attention to criminal law in the curriculum, it is hard to see how students can be blamed for coming away from law school with the feeling that perhaps the institution also shares the unfortunate tendency of the community to disapprove of lawyers who undertake the defense of people charged with crime. And the worst result of this is the consequent ignorance even on the part of very able lawyers of the extent some of the most precious values of our society are involved in the administration of criminal justice."

The explanation usually given for permitting alleged conspirators to be tried together is that if a person associates with a certain group of people, he should have no objection to being tried with them.

Where the evidence is confined to acts of representation, to try a lawyer with his client endangers the constitutional rights of both under the V, VI and XIV Amendments.

It is unfair to the lawyer and client. If the practice is allowed, the effect upon lawyers and the *clients particularly* will be devastating.

There is *no evidence* that Weinstein knew that any of the collisions were false. There is no evidence that he should have known. "Should have known" is not enough

to assess guilt. This subject is fully covered under Specification of Error No. 1(supra), "The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal."

As set forth in the appendix, the witnesses testifying against Weinstein without exception, had cogent reason for doing so. Excepting Perrin, all of the government witnesses against Weinstein were indicted defendants, conspirators, or persons fearful of what was going to happen to them next—persons who had good reason to fawn and curry favor with the prosecution. YET, NOT ONE OF THEM TESTIFIED THAT WEINSTEIN WAS ADVISED, KNEW, OR EVER INDICATED HE KNEW THAT THE ACCIDENTS WERE NOT LEGITIMATE.

It is one thing to *represent* people of such caliber in personal injury cases. It is quite another to work with them as partners.

We urge the court to recall the outstanding people who were willing, in the face of a barrage of mud and innuendo, to stand up publicly and in effect say: "I know this man. I don't believe it. It is not true". (Appendix 176-178).

Although the court would not hear most of them, 28 persons were ready to step forward. The list included community leaders of all faiths, groups and activities.

Justices of the U.S. Supreme Court and courts of appeal have been critical of mass trials. Trials similar to the one in which Weinstein found himself have bothered

the conscience of many appellate courts and judges. Some of these are discussed hereafter. The only justification for this type of trial might be the tenuous argument that if you want to consort with this type of people you should not object to being tried with them, and let the jury separate the sheep from the goats. NOT EVEN THIS SPECIOUS ARGUMENT CAN BE APPLIED HERE. Philip Weinstein is a personal injury-divorce-criminal-police court lawyer. Such a person takes his clients as he finds them. We are sure that the courts do not desire to encourage lawyers to retire from this type of practice. However, a lawyer engaged in such practice will undoubtedly have some clients who are unsavory characters, similar to the ones involved herein and with whom Weinstein suddenly found himself being tried.

Some of the general criticism of mass trials generally is stated as follows:

In *Krulewitch* v. *United States,* 336 U.S. 440, 453, Justice Jackson stated:

> "As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself."

In *Paoli* v. *United States,* 352 U.S. 232, there was a rather simple conspiracy. There was no mass trial and no multiplicity of evidentiary restrictions. A separate trial was never requested. Nevertheless, by reason of the fact that the court allowed a confession into evidence against one of the defendants which implicated one of

the others, four Justices of the United States Supreme Court felt that the defendant who was implicated by the confession did not have a fair trial. As stated at page 248:

> " * * * . After all, the prosecution could use the confession against the confessor and at the same time avoid such weighty unfairness against a defendant who cannot be charged with the declaration by *not trying all the co-conspirators in a single trial.*" (Emphasis added.)

Justice Jackson in his dissent shared by two other Justices in *Lutwak* v. *United States,* 344 U.S. 604, in emphasizing the unfairness of allowing testimony against some alleged co-conspirators and not against others, states at page 623 as follows:

> " * * * . We doubt that any member of this Court, despite our experience in sifting testimony, can carry in mind what was admitted against whom, and we are confident the jury could not."

Although guilt by association is no ground for conviction, that is exactly what caused the conviction of Weinstein. He was thrown into a mass trial with a group of disreputable and guilty people, many of whom he had represented. He was the only lawyer indicted. All inferences were immediately resolved against him. Here was the smartest one of the bunch—the only one with a college education—the mouthpiece—he must be guilty!

Attorneys must not be put in this position, or the administration of justice in the United States will suffer another grievous blow.

B. The Proof Revealed There was a Misjoinder. Therefore Weinstein was Entitled to a Separate Trial as a Matter of Law.

The following relates to an area on a motion for a separate trial by a multiple defendant where the court does *not* have discretion.

There was some evidence involving Weinstein in substantive Counts IV, V, VI, VII and VIII, involving three separate collisions. He was not charged with participation in Counts I, II or III, involving two separate collisions, nor was there any evidence of such. On the contrary, all evidence shows he did not have even a remote connection with any of those three counts.

Concerning Counts I and II, defendant Haynes testified he had never heard of Weinstein (XV, 2843). Haynes drove the car that struck the Smith car.

Defendant Smith, owner and driver of the car which was struck in Counts I and II, testified he had no dealings with Weinstein, (XVIII, 3465).

Conspirator Sanseri, a passenger in the Smith car, testified he never knew Weinstein and had no dealings with him (XV, 2907).

Edwin M. Bristol, a private investigator, witness for the government, testified as follows concerning Counts I and II:

"Q Did you investigate this entire accident?
A Yes, sir, I did.
Q And my client, Mr. Weinstein, had nothing to do whatsoever with this matter, did he?
A To the best of my knowledge his name was never

> mentioned or in any way came up in my investigation." (XVII, 3352).

Concerning Count III, conspirator Anna Kimmel (Stewart), a government witness, testified she had no dealings with Weinstein and did not know him. (X, 1960). She was a passenger in the car which was struck, Count III.

Defendant Johnstone, driver of the car which struck the car in which conspirator Kimmel (Stewart) was riding, testified he did not know Weinstein (XVII, 3899).

There is no contrary evidence regarding any of Counts I, II or III.

As shown above, Weinstein renewed his motion for separate trial at the end of the government's evidence (XIX, 3686), at the end of all of the evidence (XXIX, 5680) and on motion for new trial (R. 105).

The court erred in denying the motion. The conspiracy count was of no consequence in this regard. This court makes this very clear in *Williamson* v. *United States,* (CA 9) 310 F.2d 192. At page 197, n. 16, the court states as follows:

> "Contrary to the government's assumption, factually unrelated charges against some defendants could not be joined for trial simply because all of the defendants (except one as to whom severance was granted) were jointly charged with conspiracy in Count Three of the indictment. This is true even though the charges in all counts were 'of the same or similar character,' and therefore under Rule 8(a) might have been joined in an indictment against a single defendant. Where multiple defendants are involved, Rule 8(b) requires that *each* count of the

> indictment arise out of 'the same series of acts or transactions' in which all of the defendants 'have participated.' Ward v. United States, 110 U.S.App. D.C. 136, 289 F.2d 877 (1961); Ingram v. United States, 272 F.2d 567 (4th Cir. 1959). Since in the present case the conduct upon which each of the counts is based was part of a series of factually related transactions in which all of the defendants participated.' Ward v. United States, 110 U.S.App. though the various offenses were distinct and all of the defendants were not charged in each count."

Weinstein, having no connection in the remotest form with the matters charged in Counts I, II and III, and having renewed his request for severance in a timely manner, was entitled to severance as a matter of right. Failure to grant severance was error as a matter of law.

The two cases cited by this court in the quotation above set forth in support of the opinion in the *Williamson* case are both very much in point. In *Ward* v. *United States,* (CA, DC) 289 F.2d 877, the appellant was tried and found guilty on six counts on narcotics charges. He was tried with one Lyons who was indicted jointly in Counts IV, V and VI for a sale on September 1, 1959. Lyons was not charged in Counts I, II and III which charged appellant with sale on July 31, 1959. Lyons was also charged in Count VII with sale on December 11, 1959, which was unrelated to the July 31, 1959, sale. The appellant's timely motion for severance was denied. The court reversed conviction stating:

> "But 'where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief.' " (289 F.2d at page 878)

The other case cited in the *Williamson* case was *Ingram* v. *United States,* (CA 4) 272 F.2d 567. The sole issue was whether the appellant was entitled to a new trial because of misjoinder. He was convicted on two cases consolidated for trial over his objection. In one he was indicted for events on a particular day with one group of people. In the other he was indicted for events on another day with other people.

The court in reversing conviction stated that the *discretion* to allow severance under Rule 14 only comes into play when there is a *proper joinder*. When joinder is not proper then there is no discretion. The court went on to state as follows:

> "Just as Rule 14 does not permit the Government to circumvent the prohibition of Rule 8(b), neither does the Harmless Error Rule, Rule 52(a), have this effect. The error here was no mere technicality. The rule against jointly indicting and trying different defendants for unconnected offenses is a long-established procedural safeguard. Its purpose is to prohibit exactly what was done here, namely, allowing evidence in a case against one defendant to be presented in the case against another charged with a completely disassociated offense, with the danger that the jury might feel that the evidence against the one supported the charge against the other. *It is not 'harmless error' to violate a fundamental procedural rule designed to prevent 'mass trials'.*" (Emphasis added.) (272 F.2d at 570).

The court pointed out that at the beginning of trial when the motion for severance was made, the district judge had nothing but the indictment and he could not foresee what the evidence would be. Consequently, to deny the motion for severance was a matter of discretion.

But after the evidence was in, and the lack of connection was apparent, the motion for new trial should have been granted as a matter of right.

Judge Browning's quoted statement as to joinder (*Williamson, supra*) has just been buttressed by another circuit. In *United States* v. *Spector*, (CA 7) 326 F.2d 345, all of the defendants had not participated in the acts and transactions alleged in each count. In granting a new trial the court adopted the reasoning of the *Ingram* case, supra, and held that severance should have been granted as a matter of right.

Nor is *Schaffer* v. *United States*, 362 U.S. 511, to the contrary. In that case the conspiracy count which linked the defendants failed of proof. However, in that case, (a) there was no motion for severance or for a new trial, and (b) both the district and circuit courts affirmatively found that under the particular facts of that case, no prejudice had been shown.

Nevertheless, four of the present members of the Supreme Court would have reversed anyway on the ground that prejudice was inherent.

SPECIFICATION OF ERROR NO. III

The Trial Court Erred in Curtailing the Cross-Examination of the Witnesses Leland and Geraldine Deegan in Connection with the Alleged Intimidation by Deegan of the Defendant Boisjolie, and Other Circumstances Involving the Last Minute Confessions of the Deegans

Defendants Leland and Geraldine Deegan, husband and wife, were indicted under Counts VI and IX (R. 1). Both pleaded not guilty. (R. 213). Both were released on $500 bail (R. 10). Both employed counsel, (III, 484). They were living in Bend, Oregon, about 200 miles from Portland, working in the same night spot. Mrs. Deegan was a waitress. Mr. Deegan played in a small orchestra in the same place. This was the situation from the time of the indictment on January 20, 1961 until less than two weeks before the trial (IV, 720). The trial was scheduled to commence September 13, 1961, which it did, (I. 14).

Labor Day was Monday, September 4, 1961. Deegans' attorney was Ray Carskadon. He and his family had gone to the beach somewhere on the Washington Coast for a week, where he could not be reached (I, 7).

On Friday, September 1, 1961, just at the beginning of the long Labor Day weekend, the special prosecutor who had just recently taken over the prosecution of the case, obtained a secret indictment against Leland Deegan for intimidating one David Leon Boisjolie on July 15, 1961, in Bend, Oregon. Bail was set at $50,000 (R. Vol II, 242-245).

Boisjolie lived in Portland (XXX, 6028). He too was a defendant in the above cause (R. 1). He had pleaded guilty some months before (R. 210) but was unsentenced (R. 231).

As a matter of fact, Boisjolie had given the government a full confession October 10, 1960. Later, he testified favorably to the government before the grand jury (Ex. 32-C Id; VI, 1186-1189; VII, 1350, 1351, 1354-1359). Inasmuch as Boijolie testified after the Deegans, this was not known at the time the Deegans testified.

Based on the intimidation of Boisjolie indictment, a warrant for Deegan's arrest was issued (R. 246). It was not turned over to a deputy marshal. Instead, it was turned over to two FBI agents who went straight to Bend and arrested Deegan that night (R. 246-A) about 9:30 (I, 6).

Deegan was immediately hustled 200 miles to Portland where he was lodged in jail. The two FBI agents who arrested him questioned him on the trip from Bend to Portland, and further after he was incarcerated (III, 525-526).

Deegan was continued on $50,000 bail for several days. Bail was then reduced to $20,000. Deegan could not begin to make either figure (III, 526; XXX, 6008).

On Thursday, September 7, 1961, Deegan signed a confession in the *mail fraud case* (Ex. 405 Id.) for the same two FBI agents who had gone to Bend to *arrest* him in the *intimidation case* (II, 369; III, 427; XXX, 6015).

The next day (Friday), September 8, 1961, Deegan entered a plea of guilty in this cause (mail fraud—conspiracy). Not until that morning did his attorney learn of the signing of the confession and of his intention to plead guilty (XXX, 6013, 6015, 6021).

Significantly, sitting right behind Deegan when he was entering his plea of guilty was one of the two FBI agents who had arrested him at Bend a week before, questioned him, and taken his confession (III, 486; XXVI, 5182; XXX, 6015; R. 246-A).

Up to this time Deegan had been held under $50,000 and $20,000 bail on the intimidation charge. His bail on the mail fraud—conspiracy charge had never been over $500. Upon pleading guilty to the *mail fraud and conspiracy charge,* Deegan's bail was immediately reduced to $2,500 on the *intimidation charge* (R. 248). Whereupon, Deegan was out on bail that day (XXVI, 5184).

Ten days later, on September 18, 1961, Leland Deegan took the stand as the chief government witness against Weinstein (II, 215).

In the meantime, with the confession of Mr. Deegan, Mrs. Deegan's followed shortly thereafter on September 12, 1961 (IV, 688; Ex. 407 Id). She followed her husband to the stand and became chief co-witness against Weinstein (III, 592).

An order was entered September 12, 1961, continuing until further order the arraignment of Leland Deegan on the intimidation charge. He was continued on bail

(R. 249). As a matter of fact, Deegan was *never arraigned on the intimidation charge*. [See entire clerk's file in the intimidation case (R. Vol. II, 242-256)].

On the day of sentencing in the mail fraud—conspiracy case (February 7, 1962), Deegan was released on his own recognizance in the intimidation case and the cash bail was refunded (R. 250, 251).

The next month (March 13, 1962), on motion of the same special prosecutor who had originally obtained it (R. Vol. II, 243), the Deegan indictment for intimidation was dismissed. The only reason given for the motion to dismiss was that it had been authorized by the attorney general on March 6, 1962 (R. 253, 254; XXX, 6036, 6037).

At the brief hearing for the dismissal of the intimidation indictment, it was explained to the court that Deegan pleaded guilty in the mail fraud—conspiracy case (XXX, 6037).

As above noted, Mr. and Mrs. Deegan were suddenly and dramatically transformed from ordinary co-defendants into Weinstein's chief accusers. Quite naturally, Weinstein was vitally interested in knowing why—*and he particularly wanted the jury to know*.

Weinstein was personally convinced that the reason for the sudden shift was that it was made obvious to Deegan that the only way Deegan was ever going to get out of jail was for him to enter a guilty plea in the mail fraud—conspiracy case and become a witness for the government. — But how could Weinstein prove this?

Get this across to the jury? *The only feasible way was from the cross-examination of the Deegans themselves.*

Weinstein was positive that if he were allowed freely and fully to cross-examine the Deegans, he could have shown that the intimidation indictment against Deegan was a sham and had no substance. Of course this was known to the Deegans. (She was present at the time of the alleged intimidation.) It was Weinstein's purpose and intention to show that the Deegans, knowing that the intimidation charge was a sham and a fraud, could see that Deegan was nevertheless locked up securely in jail under exorbitant and impossible bail. He had no chance of getting out. Thus, they reasoned, if the all-powerful government could do this to Deegan on a charge so flimsy and without substance or foundation, they knew when they were beaten, and it was time to give up.

There is no question that the testimony of the Deegans hurt Weinstein. As discussed in another portion of this brief (Specification of Error No. I), the testimony was not sufficient to take his case to the jury, but once it got to the jury it was most prejudicial.

Weinstein not only intended to show by cross-examination of the Deegans that the intimidation charge against Deegan was completely spurious and the resultant effect this had on the Deegans—but, in addition, that Mrs. Deegan was very sick; that she had two operations recently, with cancer suspected; that Deegan, being held virtually incommunicado on exorbitant bail, was ready to do anything to get out of jail. Furthermore,

Weinstein intended to show that at the very time Deegan was clapped into jail his attorney was on vacation; that Deegan did not have the benefit of legal advice until after he had determined to plead guilty to the mail fraud.

When Weinstein was cross-examining Deegan, he asked the following question:

> "Q All right. Now, on or about July 15, 1961, did this fellow Boisjolie, David Leon Boisjolie, meet you in Bend?
> A He did.
> MR. BURBANK: Objection, if your Honor Please, this is improper cross examination. We are going beyond the period of the indictment in this case, also beyond the scope of direct examination.
> THE COURT: Well, he is entitled to show interest, but I think this gets even beyond that, I sustain the objection. Do you want to make an offer of proof?
> MR. DWIGHT SCHWAB: I certainly do." (III, 487)

It is obvious that the court would not allow Weinstein to question Deegan in any way concerning the events of the alleged intimidation (III, 488-491).

Thereafter, Weinstein made the following offer of proof concerning the events of the alleged intimidation, July 15, 1961:

> "MR. DWIGHT SCHWAB: I offer to prove by this witness that on or about the 15th of July, 1961, that he was playing in this tavern where he played in this little orchestra; he plays the banjo; where his wife is also a waitress. That during the course of the evening he noticed the defendant, David Leon Boisjolie, sitting there, and they got into a conversation; that Boisjolie wanted to talk to him and so Deegan said, "Well, wait until the next intermis-

sion." At the next intermission both Deegan and Boisjolie went outside, and Deegan asked Boisjolie what he was doing in Bend, and Boisjolie said, "I am just up here to have a little fun," and I think he said "whore around." And Deegan told him that that was a poor place to do that, and Boisjolie then asked him what he was going to do in this case. And Deegan told him that he was going ahead just as he already was, and he said, "Why?" and Boisjolie said, "Well, I have entered a plea of guilty," and Deegan had not heard this before and Deegan told him that he was going to continue on the same as he had before and continue on with his not guilty plea. That this was substantially all of the conversation that took place at that time, and that they then went back into the tavern and Boisjolie hung around for a while and then left and then at no time was there even a suggestion, any suggestion that Boisjolie had been intimidated in any way.

Now, that is substantially my offer of proof. That is my offer of proof as to what happened, substantially, as well as I can find out on the night of July 15, which is supposedly the basis of this indictment for intimidating the witness." (III, 533, 534)

(At no time would the court allow a question-and-answer offer of proof—III, 491, 496, 503.)

The court ruled as follows:

"THE COURT: All right, I will sustain the Government's objection to the offer of proof, first, on the ground that the attorney for the witness has invoked the Fifth Amendment. Second, on the ground that at this stage of the game of the case, I view this offer of proof as dealing with a matter that is immaterial and an effort to impeach and not properly a matter of impeachment. So, the offer of proof is denied." (III, 535)

When Mrs. Deegan was testifying, Weinstein made the following offer of proof concerning the events of the alleged intimidation of Boisjolie by Deegan, July 15, 1961:

"Are we ready, gentlemen? Do you have an offer, Mr. Schwab?

MR. DWIGHT SCHWAB: Your Honor, at this time the defendant Weinstein states that had he been allowed to cross examine the witness Geraldine Deegan, that Mrs. Deegan, to the best of his knowledge and belief, would have testified as follows, had the Court allowed her to answer questions concerning the arrest and detention of her husband, Leland Deegan, and the events leading thereto. Each of the following paragraphs is a separate offer of proof:

1. Mrs. Deegan was working the night of July 15, 1961, at the Tavern in Bend, Oregon, on her regular job, and her husband was playing in the orchestra that was playing in the same tavern.

2. The defendant, David Leon Boisjolie, came into the tavern during the course of the night of July 15, 1961.

3. That the defendant, Leland Deegan, in no way intimidated the defendant Boisjolie.

4. That after the alleged intimidation occurred, that the defendant Boisjolie remained in the tavern for some little time with several girls of local poor repute.

5. The arrest of Leland Deegan for intimidating Boisjolie and his subsequent treatment until he confessed was solely for the purpose of breaking Deegan down and obtaining evidence against Philip Weinstein.

6. Defendant Leland Deegan was arrested in Bend, Oregon, by the FBI the night of Friday, September 1, 1961." (IV, 738, 739)

* * * * *

"Defendant Weinstein offers to prove the same by the examination of Leland Deegan.

It was my purpose to show by evidence of this witness, Geraldine Deegan, and her husband, that the Government deliberately arranged this entire matter on the eve of trial for the purpose of breaking down the Deegans and getting their testimony. Were I allowed to fully and completely cross examine this witness and her husband, I could show what a transparent charge was brought against Leland Deegan on the intimidation of Boisjolie, and how he was scared, coerced and browbeaten into testifying for the Government, and thereby his wife also. It is vital that the jury know this. The testimony of these two have hurt my client. The Deegans are merely pawns being moved about in an attempt to get them to testify concerning my client. The Government never seriously considered the intimidations charge, does not now and never intends to prosecute the same. It was merely a means to attempt to get evidence against my client.

THE COURT: I must remind counsel that we are trying this case on the indictment, nine counts, against the defendants named, and we are not trying any other case at this time in this court. We are trying the one case. Counsel is seeking to bring in entirely different, extraneous matters and try the witnesses rather than the clients, and the offer of proof is denied, and I must caution you not to ask questions which have been the subject of an offer of proof and which has been rejected, because the ruling has been made, the legal determination has been accomplished, and any attempt on the part of counsel to put that matter before the jury is, I am sure, a matter that the Oregon Bar Association has spoken upon in the book involved that counsel has just read from.

MR. DWIGHT SCHWAB: Your Honor, I felt, I think you were here speaking of my cross examination of Mrs. Deegan and after we had discussed some matters concerning Mr. Deegan, I felt now, if the Court will recall, I don't want to take up any time, if the Court will recall that Mr. Carskadon

was even brought up here to consult with Mr. Deegan concerning his rights under the Fifth Amendment, and the Court was concerned about that. I felt that it was an entirely different situation with Mrs. Deegan and because she was not under indictment on this other charge, but she had considerable knowledge concerning it, but the problem of the Fifth Amendment was in no way involved. She was a witness, he was a principal in that other case, and I felt that the circumstances were somewhat different, and I can only make my record by asking the questions.

THE COURT: No, you can't. No, counsel, you have made your record by your offer of proof. I refuse to permit you to ask questions to the jury which have already been ruled out and I will not permit it.

Now, are we ready to proceed?" (IV, 740-742)

It should be noted that Weinstein was not alone in his feeling that the Deegan intimidation charge did not ring true; that on the very face of the situation there was an aura of suspicious circumstances. The judge who took Deegan's plea of guilty herein to mail fraud had the following to say during the course of that proceeding concerning the intimidation charge:

"If this is not a proper charge, I think it should be dropped against him [the intimidation charge]. If it is a proper charge, I think that the government should go ahead and prosecute him. I can tell you that I would have been less enamoured of the case had I known from the start that the witness who was alleged to have been intimidated went from Portland, Oregon, to Bend, Oregon, where he was intimidated. Now, it may very well be that he was still intimidated, but that puts a different picture on it." (XXX, 6028).

At the same proceeding, even Deegan's own attorney, Ray Carskadon, when the court asked him concerning acceptance of the guilty plea, informed the court as follows:

> "Well, just as I have informed the Court, I still think that some government agency, I don't know who, more or less brought this man in under the intimidation of a witness section, placed bail at $50,000, which I think is exorbitant. The Court reduced it to twenty thousand, which I think is still exorbitant. From the facts, the way I have learned them, I believe it is not a proper thing.
>
> "I have been, as the Court realizes, in the prosecution end as well as in the defense end, and I think that in itself was intimidation. This man's wife has been operated on twice, a throat ailment. She is home back in Bend now. I know that has been worrying him, and the idea of not getting reasonable bail has been worrying him. I don't know whether it is that that has caused this or what, but I talked to the man yesterday. At that time he informed me that he was innocent and wanted to go to trial. This morning, unknown to me, this has come up."
>
> "* * * . He didn't talk to me before he talked to the F.B.I. and made this statement. He didn't talk to me about changing his plea in any way so I am just caught cold on the thing, and I know nothing about the circumstances." (XXX, 6020, 6021)

It was clear error to refuse to allow cross-examination on the charge against Mr. Deegan for intimidation of Boisjolie which precipitated their abject confessions and capitulation as government witnesses.

In addition to the transparent intimidation charge which Weinstein was prepared to explode, the court

improperly curtailed the cross-examination of these two harmful witnesses in other ways.

Weinstein offered to prove:

"'On the night of September 7, 1961, Mr. Sherk and Mr. Householder, two FBI agents, again went out to Rocky Butte jail and spent close to three hours with Mr. Deegan in one of the rooms out there.'

MR. BURBANK: Right there, your Honor.

THE COURT: Sustain the objection.

[The offer of proof continued:]

* * * 'And gave Mr. Deegan to understand by just the way they talked to him that if he wanted to get out of jail it was necessary for him to cooperate in this case, the case that is now being tried. They didn't say that in so many words, but by the questioning that was given at that time he got that distinct impression.'

MR. BURBANK: Right there.

THE COURT: Sustain the objection." (III, 513).

In a further effort to show the pressures leading up to the capitulation of the Deegans, the following series of questions were asked of Mrs. Deegan:

"Q All right. Now, Mrs. Deegan, do you recall that your husband was arrested on the 1st day of September, 1961, in Bend?

A Yes.

Q Were you present at the time he was arrested?

A Yes, I was.

Q Did you see him on the occasion of his arrest?

Mr. BURBANK: Objection, if your Honor please, this gets into the same matter which we were on yesterday. [This reference is to Mr. Deegan's cross-examination.]

THE COURT: Sustained as not proper cross examination.

MR. DWIGHT SCHWAB: (Q) Where did the

arrest take place, Mrs. Deegan?

MR. BURBANK: Objection, if your Honor please.

THE COURT: Sustained.

MR. DWIGHT SCHWAB: (Q) After your husband was arrested, Mrs, Deegan, was he taken out of Bend immediately?

MR. BURBANK: Objection, your Honor please.

THE COURT: Sustained.

MR. DWIGHT SCHWAB: (Q) After your husband was arrested, Mrs. Deegan, when did you next see him?

MR. BURBANK: Objection, if your Honor please, that is immaterial, that is improper cross examination of this witness.

THE COURT: Sustained.

MR. DWIGHT SCHWAB: (Q) When did you next see your husband, Mrs. Deegan?

MR. BURBANK: Objection on the same grounds, your Honor, I think this calls for an offer of proof.

THE COURT: I will ask counsel to refrain from asking the questions, the offer of proof on the subject has been already rejected as a part of another witness. You can show interest or bias but this line of testimony is not proper.

MR. DWIGHT SCHWAB: May I have an exception, also, your Honor.

THE COURT: This line of testimony shows nothing of the kind, counsel.

* * * * *

Q At the time that your husband was arrested and on $20,000 bail and $50,000 bail, what was the state of your health?

MR. BURBANK: Objection, if your Honor please.

THE COURT: Sustained.

* * * * *

Q Did he lead you to believe that he could get out on bail if he would get $250?

A Yes.

Q And state whether or not you had trouble raising the $250?

MR. BURBANK: Objection.

THE COURT: Sustained, counsel, the only matters you are entitled to inquire into, I have advised you, are matters that have to do with interest of something that would affect the credibility of this witness. Now, you are getting far afield and I must caution you.

MR. DWIGHT SCHWAB: Well, your Honor, it is hard to segregate it.

THE COURT: No, counsel, you are very capable and able to do so.

MR. DWIGHT SCHWAB: Thank you.

(Q) Did you raise the $250?

MR. BURBANK: Objection, if your Honor please.

THE COURT: Sustained.

MR. DWIGHT SCHWAB: (Q) Did you see your husband that night or did you talk to him at a later time?

MR. BURBANK: May I have the question, please?

THE COURT: Would you read it, please?

(Last question read.)

MR. BURBANK: Objection unless there is proof.

THE COURT: Sustained. Counsel, you are inquiring into matters that have no connection with this action at all and are not proper cross examination and are not within the field on which I permitted you to inquire." (IV, 720-725)

Thereafter, Weinstein offered to prove through Mrs. Deegan the following matters:

"7. The arrest of Leland Deegan occurred at a tavern where Deegan played in a small dance orchestra and where his wife was a cocktail waitress.

8. The arrest occurred on the bandstand while the orchestra was playing a number.

9. Deegan was almost immediately taken out of the band by the FBI to Portland.

10. He was barely allowed to say "goodbye" to his wife.

11. The witness Geraldine Deegan was sickly, having recently had several operations.

12. She could not see him or communicate with her husband, despite every effort to do so. He was held incommunicado.

13. She tried to communicate with Attorney Ray Carskadon, attorney for both Deegans in connection with this case, but found he had been on vacation for some while on the Washington coast, and was then on vacation.

14. Deegan never had a chance to talk to his attorney before his confession was taken.

15. Mrs. Deegan saw Deegan in court when his bail was reduced from $50,000 to $20,000.

16. Deegan was desperately upset. He was ready to do anything to get out of jail.

17. The primary interest of both Deegans was to get him out of jail.

18. Twenty thousand dollars bail was far beyond the reach of the Deegans.

19. Leland Deegan contacted Geraldine Deegan the afternoon of September 8, 1961, after he had pled guilty. He told her to raise $250 and he could get out on bail.

20. Mrs. Deegan had an extremely difficult time, but by going to a number of people over a period of several hours, she was finally able to raise $250, which was wired to Portland.

21. Deegan was out on bail that evening.

Defendant Weinstein offers to prove the same by the examination of Leland Deegan." (IV, 739, 740)

The entire offer was rejected. (See supra 96, 97; IV, 741, 742).

Through Leland Deegan, Weinstein offered to prove that Deegan's wife was sick at the time of his arrest as follows:

"* * * . That he was immediately brought to Portland and lodged in Rocky Butte jail. That he was questioned by the FBI and he had a sick wife.

MR. BURBANK: I am going to object to that part, your Honor.

THE COURT: I don't think that is proper." (III, 519)

A number of times Weinstein tried to prove that Deegan did not have an opportunity to consult with his attorney and that this was all a part of the situation with which the government faced Deegan. Weinstein offered to prove:

"MR. DWIGHT SCHWAB: All right, perhaps the court can rule as we go along. That he did not have the opportunity to consult with his attorney who was on vacation at the time.

THE COURT: That is not proper.

MR. DWIGHT SCHWAB: You are ruling all that out?

THE COURT: Yes." (III, 519)

At another point Weinstein again offered to prove:

" 'Mr. Deegan still had not talked to his attorney.'

MR. BURBANK: Just a moment to that point, your Honor.

THE COURT: Sustain the objection." (III. 508)

Whenever Weinstein attempted to examine either of the Deegans on any phase of bias, his attempts were severely hedged and restricted, as a reading of that phase of the cross-examinations will show (III, 484-537; IV, 720-742).

The situation is reminiscent of *United States v. Standard Oil Co.,* (CA 7) 316 F.2d 884, 891, where:

> "* * * the court 'protectively erected barrier after barrier to the effective cross-examination of Rice.' "

It was most important to show all the circumstances of Deegan's arrest; how he was swooped upon as he was playing his banjo in the tavern where he and his wife were working, right in the middle of a number; how he was whisked out of town immediately by the two FBI agents and hardly allowed to say good-bye to his wife; all adding to the awe and hopelessness of two scared people.

It was important to show that Deegan was held incommunicado—further adding to the mounting fear—that his attorney was vacationing on the Washington coast and could not be reached, although Mrs. Deegan attempted to reach him.

It was important to show the coercive force of impact that the $50,000 and the $20,000 bail figures had on the Deegans by the testimony of Mrs. Deegan that she had great difficulty in raising a measly $250 cash for the bail bondsman at the time bail was reduced immediately after Deegan's guilty plea herein.

The enormity and pressure of the intimidation indictment is apparent from the mere mathematics of the bail. Deegan had been out on $500 bail on the mail fraud charge. Along comes the spurious intimidation indictment and he is put under bail 100 times greater, later reduced to 40 times greater.

Of course, of primary importance was a full showing as to the spurious nature of the intimidation charge thrown at Deegan, thus completing the utterly hopeless picture.

It cannot be said by any means that full inquiry of the Deegans on the question of bias would have been fruitless. It should not be overlooked that Weinstein's counsel had talked to the Deegans after Mr. Deegan had confessed (III, 472; IV, 709), and to the extent that he was allowed to do so, had developed significant evidence favorable to Weinstein, such as:

1. Weinstein had never given any indication to the Deegans that he had any notion that the collision (Count VI) was spurious, (III, 463, 464, 472, 473; IV, 709, 710, 718).

2. The Deegans affirmatively testified that they had never ever indicated to Weinstein that the collision had in fact been set up. (III, 480; IV, 689).

3. The Deegans positively testified that all sums of money paid to them by Weinstein had been by way of subsistence loans while their case was pending (III, 465-472).

4. The Deegans positively testified that all sums

that had previously been paid to them by Weinstein were deducted from their share upon the final settlement of the case (III, 465-472).

Most assuredly, verbal threats and promises are by no means the only—or even the most effective—method of persuasion or suggestion under many circumstances.

Weinstein was hardly allowed to commence any exploitation of the entire subject of real bias. The basis for the rulings was that the matter was collateral—that this was an attempt to go into the facts of other cases:

> "THE COURT: I must remind counsel that we are trying this case on the indictment, nine counts, against the defendants named, and we are not trying any other case at this time in this court. We are trying the one case. Counsel is seeking to bring in entirely different, extraneous matters and try the witnesses rather than the clients, and the offer of proof is denied, and I must caution you * * *." (IV, 741)

To apply such restrictions is reversible error. An important case is *United States v. Masino,* (CA 2) 275 F.2d 129. In this case there were two principal government witnesses, Brown and Beville.

As to Brown, defendants offered to show he had been arrested on the charge of possessing narcotic gear and that the proceedings against Brown had been dismissed at the urging of a federal prosecutor. The trial court curtailed the cross-examination of Brown and excluded the proffered evidence regarding the charge against Brown and the disposition of that charge by the other court. The defendants also tried to go into the merits

of the matter—that is, whether Brown did nor did not have possession of the gear. This was also denied by the court.

In holding that this was reversible error, the Court of Appeals said (275 F.2d at 132).

> "It was highly relevant and material to bring out that the state court charge for possessing such instruments for the administering of narcotics had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government. This is the kind of situation where the widest possible cross examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. It was substantial error for the trial judge to restrict this line of cross-examination."

As to the other prosecution witness, Beville, the government on direct examination brought out about what the court allowed Weinstein to prove in this case, i.e., Beville had been indicted for his participation in the transaction involving Masino, that he pleaded guilty and was on probation. The record also showed that there were two other counts relating to a sale of narcotics on a previous occasion (not related to Masino) and these were dismissed. The defense unsuccessfully sought to develop whether Beville had been indicted for the previous sales, *the facts concerning the sales,* etc.

Thus, they were seeking to "try a collateral matter", "try another lawsuit" or "bring in collateral matters,"

the purported basis for the restriction on cross-examination of the Deegans.

This was also held to be reversible error (275 F.2d at 132-133):

> "All the facts regarding the indictment against him [Beville] and the disposition of the other two counts were pertinent so that the jury could pass judgment on Beville's motives and their effect on the truthfulness of his testimony."

The court then added:

> * * * "The indictment and its disposition was a matter so intimately related to Beville's possible motives to falsify and his relationship to the government which had called him as its witness that the trial court should have allowed full exploration of these matters on cross-examination."

In reversing the case, the Court of Appeals summarized the applicable rules as follows:

> "Indeed, where the principal witnesses appearing in behalf of the prosecution have a criminal record or have engaged in illegal practices and are accomplices to the crime charged, it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit."

In *United States v. Hogan,* (CA 3) 232 F.2d 905, the trial court instructed the jury that two accomplices, whom the defendant wanted to cross-examine in regard to their having pled guilty before another judge, had not been sentenced and that their testimony should be viewed with caution. However, he would not allow the defense to go into the details.

In other words, the court itself instructed the jury

approximately to the extent that Weinstein was allowed to cross-examine the Deegans.

In reversing the trial court, the Court of Appeals said (232 F.2d 907):

> "But this instruction to the jury was not an adequate substitute for active cross-examination. The importance of cross-examination here is that it enables the jury to determine what effect, if any, the postponing of sentence and the release of recognizance had upon the minds and conduct of the witnesses (citing authority). Merely informing the jury that the witnesses were yet to be sentenced does not bare for the jury's appraisal the extent to which the witnesses may have been motivated by expectations of leniency."

The Hogan case is cited with approval in *Thurman v. United States,* (CA 9) 316 F.2d 205, 206. Limiting full cross-examination of a co-conspirator who has pleaded guilty and become the principal government witness is error.

In *Spaeth v. United States,* (CA 6) 232 F.2d 776, 62 A.L.R.2d 606, Mr. Justice Stewart sat as a circuit judge. This case also explodes the idea that because some other case is involved, one cannot delve into the matter on cross-examination. The defendant was being tried for perjury. The chief government witness was a bank robber. The defense wanted to cross examine on all the details concerning the bank robber's conviction in another cause. This was not allowed.

The Court of Appeals reversed on the ground that there should have been careful scrutiny of the bank

robber's motive for testifying, and the defense should have been allowed to go into the matter completely.

The other cases similar to the case at bar are:

Sandroff v. *United States,* (CA 6) 158 F.2d 623.
Farkas v. *United States,* (CA 6) 2 F.2d 644.

In both cases the defense attempted to develop fully facts and circumstances of another case where the prosecution witness had been arrested. The court held that such should be allowed.

See also, *United States v. Lester,* (CA 2) 248 F.2d 329.

Based almost wholly on two of the above cases *(United States* v. *Lester,* and *United States* v. *Masino),* Wigmore had added a new paragraph to his work on Evidence, Volume III, §967, 1962 Pocket Supplement, page 186:

> "Apart from accomplices and co-indictees, a witness in a criminal case, as well as in a civil case, may have a motive to testify falsely about a particular matter. No useful purpose would be served in undertaking to enumerate even some of the innumerable motives that may exist. Suffice it to say that evidence of such motive is to be distinguished from that which merely tends to discredit the witness generally."

SPECIFICATION OF ERROR NO. IV

The Trial Court Erred in Denying Weinstein's Motion for Access To Certain Documents. (Jencks Act)

A. Katherine Hart:

Katherine Hart was called as a government witness. She testified she went to Weinstein's office early on an October 1958 morning with George Barnard. She said she was asked to leave the room. Shortly after, she and Barnard left the office and Barnard went to the bank and got some money (XVIII, 3491).

She identified Weinstein in the courtroom (XVIII, 3489). This, in spite of the fact that a year previous she testified at another proceeding that she would not be able to recognize Weinstein (XVIII, 3565), and she has never seen him since the alleged October 1958 visit (XVIII, 3572).

1. Cross-examination developed that Katherine Hart had been in contact with government agents on at least four different occasions, at which times statements were made or notes were taken by the agents. The first occasion of her contact was when she *voluntarily* went to the FBI not over three weeks after the above alleged incident (XIX, 3607, 3608). She said she made the office visit after October 17 (XVIII, 3571); the FBI visit was no later than November 6, 1958 (XIX, 3650).

On cross-examination she was asked as follows:

"Q *When did you first talk to any police officer*

about any of this that you have been telling us about here today?

A Any? Does that mean federal or state policemen?

Q Just any of them.

A The first time I talked to anybody about it was in February of 1958.

Q In February of 1958?

A Yes, or excuse me, November.

Q *November of* 1958?

A *Yes.*

Q And who did you talk to?

A I talked to two F.B.I. agents.

Q Where?

A In this building.

Q And did you give them a statement at that time?

A Yes, I did."

* * *

"Q And a statement was taken?

A Yes." (XVIII, 3591.)

At this point Weinstein's counsel asked for the statement (XVIII, 3593).

Government counsel volunteered that the statement given by Katherine Hart was not on the subject matter of her testimony (XIX, 3610). The court in denying the request said the same thing and, further, that it was not a verbatim statement (XIX, 3650). Yet the question asked the Hart woman which brought this statement to light was as to *when she first talked to the police about the matter she had just testified to.* It is marked court Exhibit "K" (XIX, 3651).

This interview of Katherine Hart with the FBI within three weeks after her alleged visit to Weinstein's office

was important. If she made no mention whatsoever to the FBI of her alleged visit to Weinstein's office this would have been effective in discrediting her story. This was pointed out to the court (XVIII, 3559).

> "The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."
>
> *Jencks* v. *United States,* 353 U.S. 657, 667;
> *Campbell* v. *United States,* 373 U.S. 487.
> *United States* v. *McCarthy,* (CA 3) 301 F.2d 796, 799.

2. The Hart woman talked to government agents again July 16, 1960, when she gave a 30-page statement. This was shortly before the grand jury convened and the government was in full investigation. Upon request (XVIII, 3492), Weinstein was later given a very small portion of the statement consisting of excerpts from several pages. It was not even coherent (Ex. 454, XVIII, 3558-3560; XIX, 3661). The remaining 28 or so pages were refused to defendants and marked court Exhibit "I" (XVII, 3503).

Here again, the very fact (if it be a fact) that Katherine Hart had nothing to say in Exhibit "I" (XVIII, 3503) about seeing Weinstein on that morning in October, 1958, would be of importance. The entire 30-page statement should have been turned over to counsel (XVIII, 3559) so she could be adequately cross-examined as to why she talked about what she did talk about, rather than what she testified concerning.

Certainly, the excising process should not destroy the continuity of the report as it did here, *Holmes v. United States,* (CA 4) 284 F.2d 716, 720.

B. Geraldine Deegan:

Geraldine Deegan and her husband were the chief government witnesses against Weinstein. The day before the trial started (September 12, 1961), Mrs. Deegan signed a statement for the government. She and her husband were named defendants. Up until that time she and her husband had maintained pleas of not guilty. It was important for Weinstein to be able to take her signed confession as a whole and then cross-examine her. However, the court excised a portion thereof.

The portion furnished defendant is marked Exhibit 407 (IV, 686); the deletion Exhibit C (IV, 649).

SPECIFICATION OF ERROR NO. V

The Evidence Showed no Single Conspiracy As Charged, But if Anything, A Group of Conspiracies.

At the end of the government's case, the defendant Weinstein moved for judgment of acquittal on the ground that the evidence showed no single conspiracy; therefore a variance existed. (XIX, 3685).

Motion denied (XIX, 3714).

At the end of all the evidence, Weinstein again moved for judgment of acquittal as follows:

> "There is a variance exists between the indictment and the proof in that the indictment alleges an overall, single conspiracy and, at the most, the government's proof was a series of small, disconnected, individual conspiracies." (XXIX, 5680)

Motion denied (XXIX, 5689).

When one joins with another in a criminal venture, it is not enough that *he knows* his confederate is engaged in other criminal undertakings with other persons, even though they be of the same general nature. The acts and declarations of confederates, past or future, are not competent against the party except *insofar as they are steps in furtherance of a purpose common to him and them*. Declarations become competent only when they are uttered in order to accomplish a common purpose.

This case involved six separate and distinct collisions. The only person who was tied into each of these six separate collisions was defendant George Barnard. The six collisions extended over a period of some 18 months.

Taking the six collisions in the order in which they occurred, we discuss briefly the persons involved in each (excepting George Barnard):

1. August 18, 1958 (Counts VII and VIII).

The persons in the cars were defendants Allison, John Barnard, Giegerich, and conspirator Page.

Weinstein was attorney for Allison, John Barnard and Page.

Six in all. There is no evidence of the involvement of any other defendant or conspirator.

2. September 11, 1958 (Count VI).

The occupants of the two vehicles were defendants Leland and Geraldine Deegan, Saunders, and Boisjolie, and conspirator Howerton.

Weinstein represented the Deegans and Saunders.

Seven in all. There is no evidence of the involvement of any other defendant or conspirator.

3. October 16, 1958 (Counts IV and V).

The occupants of the two vehicles were conspirators Gordon McCoy, Dunham, Miller, Rose and Swertfeger.

There was some evidence that defendants Saunders, Boisjolie, John Barnard and Knippel were involved.

Weinstein started to represent the occupants of the struck car—Gordon McCoy, Miller, Rose and Dunham, but turned them over to attorney Ben Gray. Weinstein loaned them money, which was repaid.

Eleven in all. There is no evidence of the involvement of any other defendant or conspirator.

4. January 18, 1959 (not in indictment.)

The occupants of the two vehicles were defendant Knippel and conspirators Kerr, James Barnard (this was neither George nor John) and Wooldridge.

Weinstein was asked by Kerr and Knippel to represent them. He referred them to attorney Ben Gray. Weinstein loaned them money, which was repaid.

Six in all. There is no evidence of the involvement of any other defendant or conspirator.

5. September 5, 1959 (Count III).

The persons in the cars were defendants Johnstone and DePlois, and conspirator Kimmel (Stewart).

There was some evidence that defendants Knippel and Lasiter were involved.

Six in all. There is no evidence that defendant Weinstein nor any other defendant or conspirator had any involvement with the matter whatsoever.

6. February 16, 1960 (Counts I and II).

The persons in the cars were defendants Smith and Haynes, conspirators Sanseri and Donovan McCoy.

Five in all. There is no evidence that defendant Weinstein nor any other defendant or conspirator had any involvement with the matter whatsoever.

Making the assumption that Weinstein was connected with "a conspiracy," it is obvious that there was more than one conspiracy. It is true that the thread of George Barnard ran through all of them, but that is far from being sufficient.

The evidence does not show any single, central, guiding over-all entity. At most it shows six separate collisions arranged by George Barnard. Each collision involved a different group. There is nothing to show that the other uninvolved defendants and conspirators had any interest in any collision other than the one or two in which he or she was directly involved.

True, in each collision you find George Barnard. But

there it ends. From there on the involved persons vary radically from collision to collision. The interests of the participants are confined to the single matter at hand—not to any over-all common purpose involving other matters.

This brings the case, insofar as Weinstein is concerned, within the purview of *Kotteakos v. United States,* 328 U.S. 750. Here the "George Barnard" was a Simon Brown. He was the common and key figure in all the transactions proven. However, that was as far as it went. Each transaction was separate. There was no connection between them *except* this Brown. Although each transaction had many features very similar to all the others, that did not create any single over-all conspiracy. It was a group of small, separate conspiracies, at least eight in all. This constituted a prejudicial, fatal variance.

Another important case is *Rocha v. United States,* (CA 9) 288 F.2d 545.

The "George Barnard" in this case was a Mary Drummond who arranged for American women to enter into fraudulent marriages so aliens could enter this country. There were six different marriages. Here again, although the purpose of each of the six transactions was the same, although Mary Drummond was the central figure in each, and although a number of the named participants knew each other, that was not sufficient.

This court said that it could see no basis for even an inference that any one "husband" was interested in

anyone's marriage or entry other than his own. The same could be paraphrased here to a large degree, substituting the word "collision" for the word "marriage". It was held there was no proof of any over-all conspiracy—merely six separate, individual and unconnected conspiracies. Thus a fatal variance existed.

Both the *Kotteakos* and *Rocha* cases make it clear that the participation of a "George Barnard" in all of the various separate and distinct crimes, related in kind though they might be, is not sufficient to permit lumping all together as a single conspiracy.

Perhaps the most significant thing that could be said in this regard is to quote a comment of the trial judge to the jury. This was made at a time when almost 3000 pages of testimony had been taken. It is an indication of the impact of the testimony on the trial judge regarding any "over-all" conspiracy:

> "THE COURT: I will instruct you also if I may at this time and finally when the case is concluded, that I now do not know and I am not sure that any of counsel know what the evidence will produce as to the date the conspiracy OR CONSPIRACIES terminated. That will be a matter which will probably be up to the jury to determine. If you determine that this testimony or this conversation was after ALL CONSPIRACIES had terminated, you will not consider it in any respect as in support of Count IX." (XV 2929)

At this point, over four-fifths of the government testimony had been heard.

SPECIFICATION OF ERROR NO. VI

The Trial Court Erred in Admitting Hearsay After the Termination of the Alleged Conspiracy.

The last specific overt act set forth in the conspiracy count (IX) is number 5, dated May 11, 1960 (R. 9).

Hearsay testimony should not have been received against any person not present subsequent to the date of the last alleged overt act (May 11, 1960).

Count IX also charges as overt acts each and all of the overt acts of the defendants and their conspirators alleged in the first eight counts (R. 1-7). In each of the first eight counts it was alleged that as a part of the scheme to defraud, the defendants would conceal that the collision was planned by the defendants and consented to by the occupants of the vehicles in advance of its occurrence. This did not extend the alleged conspiracy beyond May 11, 1960.

The court erroneously admitted a number of hearsay statements made subsequent to May 11, 1960. These occurred during the testimony of the defendant David Leon Boisjolie and the woman with whom he was living, Edith Thomas (now Boisjolie):

1.(a) Boisjolie testified that a postal inspector (Severtson) and a number of other officers came to see him where he was working at closing time, October 10, 1960. His "wife", Edith Thomas, was there. No other defendant was present. He was asked the following question:

"I will now ask you at six o'clock what, in the

presence of these people only, what you did and what you said?" (VI, 1198)

The following objection was made by Weinstein:

"MR. DWIGHT SCHWAB: Well, that is one thing, another thing is that they are attempting to bring in statements here or happenings, matters, that took place outside of the presence of any of the defendants in this case and, so, it would be wholly irrelevant and immaterial. Of course, we have an inference on an inference objection; that certainly is a valid objection. Another one is that sometime this conspiracy had to end, Your Honor, and this was at the end of 1960, shortly before the indictment came in. The last overt act that has been charged that I can recall happened in 1958 or early 1959 so, this would be a year and a half after that and the only possible way this would come in is if a conspiracy is established. Now, the Court is letting this evidence come in subject to the establishment later of a conspiracy, but there has to be some limitation somewhere and assuming that they can establish conspiracy this certainly is long after the conspiracy ended.

THE COURT: What about the matter that counsel was talking about, about their concealment? Does that matter of concealment continue?

MR. DWIGHT SCHWAB: That could go on forever, if that is what they are relying on, they could have brought this charge fifty years from now and tried these people, assuming they were still alive. I don't think that is a valid ground.

THE COURT: It's in the indictment.

MR. DWIGHT SCHWAB: That still doesn't make it good, Your Honor, there is a lot of things that could be in the indictment. The thing is it's over a year and a half after the last overt act that has been alleged in this case, the last overt act that is really an overt act in this case was in January, 1959, I believe that is the accident that is alleged in Count VII and VIII.

MR. BURBANK: Counsel is mistaken, Your Honor, the last overt act charged is on or about May 11, 1960.

MR. DWIGHT SCHWAB: What is that?

MR. BURBANK: George Barnard and Richard Sanseri delivered a bank draft in the amount of $600.

MR. DWIGHT SCHWAB: If they are going to rely on a bank draft that is still five months prior to the time they are talking about here."

* * * *

"THE COURT: I will overrule the objection, he may answer." (VII, 1203-1205)

The government had stated it intended to use this hearsay against Boisjolie's attorney and would identify the attorney as being Weinstein (VI, 1198, 1199).

Boisjolie testified in answer to the question:

"Edith was there and I told her to call my lawyer and that there was a man that was a post office inspector that wanted me to come in with him that night and he was accompanied with two other people, I told her." (VII, 1205)

1.(b) Edith Thomas ("Boisjolie" at the time she testified), the woman with whom Boisjolie was living, was asked about meeting Boisjolie the evening of October 10, 1960, when he saw the postal inspector (VII, 1368).

Weinstein objected as follows:

"MR. DWIGHT SCHWAB: I am going to object, one, on the ground that counsel is leading the witness, and, two, I am going to object, as previously, Your Honor, that this relates to matters that must have happened after any conclusion of any conspiracy which the Government might prove at some time in the future." (VII, 1369)

The objection was overruled (VII, 1369).

She then testified as follows:

"Q Can you tell us what took place when you met your husband at Howard Auto Supply about six o'clock that evening?
A He asked me to make a phone call.
Q Will you tell us, as best you can recall what your husband asked you to do?
A He asked me to call Phil Weinstein and see what he could do for him.
Q And what did you do thereafter?
A I called him at his home.
Q Called who?
A Phil Weinstein.
Q Did you have a conversation with Mr. Weinstein at that time?
A Oh, just that I told him Dave was downtown and that three men had picked him up and that one was a Postal Inspector and that Dave wanted to see if he could do something for him, and he told me to have Dave call him when he got home.
Q I see, and what did you do after you had made your phone call?
A I went home." (VII, 1370)

She made no other phone calls nor talked to anyone else (VII, 1370, 1371).

1.(c) Before midnight defendants Knippel and Lasiter came to her home (VII, 1372, 1373). The following then transpired:

"Q During the course of their stay was any conversation had by you with Mr. Knippel and Mr. Lasiter or any conversation had by Mr. Knippel and Mr. Lasiter in your presence?
A Yes.
MR. DWIGHT SCHWAB: Objection, Your Honor, on the grounds this is hearsay as far as my client is concerned and it is beyond any scope of

Count IX. In other words, it has no relevancy or competency or materiality.

THE COURT: Overruled.

* * * * *

MR. BURBANK: (Q) Now, Mrs. Boisjolie, will you tell us as best you can remember what was said by Mr. Knippel and said by Mr. Lasiter at that time?

MR. DWIGHT SCHWAB: The same objection.

THE COURT: Yes, and the limitation that has previously been given to the jury will apply to the particular statements made by this witness with reference to the conversation.

MR. BURBANK: Count IX, you mean, Your Honor?

THE COURT: Yes, the conversation in Count IX having to do with direct evidence with reference, applying to the persons who were present making the statement and only as part of the conspiracy Count IX, if and when later connected. Do you have the question, Mrs. Boisjolie?

A Yes.

THE COURT: All right, can you answer it?

A They talked about for Dave to keep his mouth shut.

THE COURT: Would you talk a little closer to the microphone, please?

A They said for me to tell Dave to keep his mouth shut about what, I don't know what they were talking about. I know now what it is all about.

MR. BURBANK: (Q) Well, Mrs. Boisjolie, I am concerned only with what they said at that time, as best you can recall.

A Well, it was just for Dave to keep his mouth shut, and it was best for him to leave town, that is what they said." (VII, 1374, 1375)

Thereafter, the same effect:

(VII, 1389)

"THE COURT: * * *. My understanding is that

there is a continuing objection to this. I will permit the examination further and will permit a continuing objection on the part of all defendants' counsel."

* * * * *

(VII, 1392)

"A That they thought that Dave should get out of town and that they were going to."

* * * * *

(VII, 1393)

"MR. BURBANK: (Q) After you spoke to Mr. Knippel and Mr. Lasiter on the subject of Mr. Boisjolie being downtown, what did Mr. Knippel and Mr. Lasiter say with respect to that, just that subject alone, if anything?

A. Just to tell Dave to keep his mouth shut."

The obvious purpose of the foregoing testimony was to show that Weinstein, upon receipt of the phone call from Edith Thomas at the instance of Boisjolie, sent Lasiter and Knippel over to Boisjolie. It was highly prejudicial.

2. While Boisjolie was testifying, he was asked what time he arrived home from talking to the postal inspector and he stated between twelve and one o'clock in the morning (VII, 1206). Boisjolie continued as follows:

"Q Can you tell me what happened within the next ten hours after your arrival at home?

A After I had gotten home, Edith had told me.

Q Not what was said to you, not what Edith told you, but what happened, what you observed, yourself?

MR. DWIGHT SCHWAB: May we have a continuing objection?

THE COURT: Yes, you may.

A Well, I went to bed about five or six in the morning, Willie Lasiter and Ray Knippel were there.

MR. KATZAN: Your Honor, I wish to again object on the same grounds previously stated during the recess.

THE COURT: You have a continuing objection, counsel.

* * * * *

MR. BURBANK: (Q) At that time was anyone present other than yourself, Ray Knippel and William Mack Lasiter?

A Edith was there, also.

Q At that time you heard a conversation take place?

A Yes.

Q Will you tell us as best you can recall what was said by Mr. Knippel, what was said by Mr. Lasiter and yourself on that occasion?

MR. RANSOM: I object to the question on the grounds that the question is hearsay evidence and substantive evidence of something that may have happened at that time. I do not believe this is admissible, it's irrelevant and immaterial and it is hearsay.

THE COURT: Overruled.

* * * * *

MR. KATZAN: Your Honor, it's my understanding that this objection applies to all the counts?

THE COURT: Yes.

A The conversation was that Willie and Ray were leaving town that hour.

MR. BURBANK: (Q) As best you can, Mr. Boisjolie, please tell us what was said by either Mr. Knippel or Mr. Lasiter to you, as best you can, the best you can presently recall, identifying the people who spoke.

A Well, Ray told me he was going over the mountain; that Willie was, as I take it, told me he was going to a ranch and that it would be best if I would leave town for a while.

Q Was anything further said at that time?

A Yes, I told them I couldn't afford to leave town.
Q Was there any response made to that comment of yours?
A Yes, *they told me to go down and get some money from Phil Weinstein.*
Q Who told you this?
A I am not sure which one told me.

* * * * *

MR. DWIGHT SCHWAB: I move to strike that question and answer, Your Honor, on the ground that it is very leading. I also ask the Court to strike the testimony of this episode which he just finished with, for the ground previously stated. [This motion referred to the objection set forth in ¶ 1.(a) supra (VII, 1203-1205).]

THE COURT: Overruled." (VII, 1206-1209)

Thereafter, Weinstein moved to strike all hearsay testimony given by Boisjolie as follows:

"MR. DWIGHT SCHWAB: I would like, Your Honor, before we start this morning, to move to strike all of the testimony which appears in the record that was taken from the witness on the stand, Boisjolie, concerning particularly matters that occurred around the fall of 1960, on the grounds, of course, that it is hearsay, and particularly on the ground it's being offered in connection with Count IX. If it is being offered in connection with Count IX that the conspiracy if there was one, was at an end. The only possible theory that conspiracy, as I understand it, could have continued up to that time, up until after sometime in the year 1959, is on the theory that these people got together and were concealing, they conspired to conceal, and that is no grounds at all for the theory of the continuation of the conspiracy, so I particularly would move to strike all of that testimony concerning what went on in the year, last half of 1959 and the year 1960, and I also move to strike all hearsay statements of this

witness insofar as they relate to my client.

THE COURT: Are you taking the position, Mr. Schwab, that there cannot be a conspiracy to conceal?

MR. DWIGHT SCHWAB: Yes, Your Honor.

THE COURT: Can't there be a conspiracy?

MR. DWIGHT SCHWAB: I haven't read it carefully but I think one case I am thinking of is the case of the United States v. Gruenwald, or Greenwald, where the Court indicated that if this were considered to be a continuation of the conspiracy it could go on forever, and I think that that well fits this case.

MR. BURBANK: On that point, Your Honor, it seems to me inherent in the particular conspiracy here charged that its efficacy to be recognized—

THE COURT: (Interposing) I am going to rule for you, don't argue unless you have to because we are losing time.

MR. RANSOM: I would join in Mr. Schwab's motion.

THE COURT: I understood that the motion is made for the benefit of all defendants' counsel, and the motion is denied." (VII, 1240-1242)

The prejudicial nature of this testimony is obvious. It becomes greater when it is coupled with Boisjolie's testimony that he got money from Weinstein just two weeks earlier. (See Specification of Error No. I, Page 30.)

3. Boisjolie testified as follows concerning a conversation he had with defendant Johnstone the day the indictments herein were being served:

"Q Did you subsequently meet Mr. Johnstone again?

A Yes, I did.

Q And when was that?

A That was just before the indictments were served on January 21, 1961, I believe. [The in-

dictment herein was returned January 20, 1961 (II, 325); it was filed that date (R. 1).]

Q Was it on January 21 that you met Mr. Johnstone, or is that when the indictments were served?

A The date that the indictments were served was the date that I had met him again.

Q All right, and where did you meet him?

A At Thorp's Restaurant.

Q Was anyone present other than yourself and Mr. Johnstone on that occasion?

A No.

Q Can you tell us whether or not the conversation occurred at that time?

A Yes, it was.

Q Can you tell us, again you understand my questions deal with the subject matter we have discussed heretofore?

A Yes.

Q Can you tell us what was said by Mr. Johnstone on that occasion and said by you to Mr. Johnstone, as best you can recall the words?

A Mr. Johnstone told me, he said that I would be picked up that day, the best thing for me to do would be to get out of town. I told him I couldn't afford it and he told me to go down to *Phil Weinstein and get some money.*

Q Was anything else said on this subject matter at that time at that place?

MR. DWIGHT SCHWAB: I move to strike that, Your Honor, on the grounds previously stated. [This motion refers to objections set forth in ¶ 1. (a) supra (VII, 1203-1205) and ¶ 2. supra (VII, 1240-1242).]

THE COURT: Motion denied, and the matter is permitted to be received under the admonition given to the jury previously that it is not to be binding on the other defendants unless it's subsequently tied in with some matter." (VII, 1251-1252)

Thus, we here have highly prejudicial hearsay of an event occurring not only long after the last overt act alleged (May 11, 1960), but which occurred even after the filing of the indictment.

4. Boisjolie was asked concerning further conversations occurring in October 1960 (VII, 1243, 1244):

> "MR. BURBANK: (Q) Now, Mr. Bosijolie, will you tell us, please, what was said by Mr. Lasiter to you, and by you to Mr. Lasiter on that occasion, as best you can presently recall?
>
> MR. DWIGHT SCHWAB: As far as my client is concerned we have a continuing objection that it is hearsay.
>
> THE COURT: Yes, and it will be admitted under the admonition previously given to the jury.
>
> MR. BURBANK: (Q) Do you recall the question, Mr. Boisjolie?
>
> A Yes, I do, Willie [Lasiter] was telling myself that Willie said that he was going to fix Ray Knippel at this time, that Ray had goofed by going back with his wife. He went through details on how he was going to do this and said that would happen to anyone else that squealed or goofed. (VII, 1244, 1245)

Then Boisjolie continued with the following hearsay conversation that took place in November 1960 as follows:

> "MR. BURBANK: (Q) Mr. Boisjolie, the best you can recall give us the words that were used by the respective people at that time, what they said and what was said in your presence at that time; where you can't recall specific words, give us the substance of the conversation. Now, what was said by these people?
>
> A Well, Willie said that Ray Knippel had approached a minor about being involved in a

crime, and that he would surely go to jail for it." (VII 1248)

* * * * *

"MR BURBANK: (Q) Mr. Boisjolie, did Mr. Lasiter say anything about the nature of the crime to which you have referred?

A Yes.

Q What did Mr. Lasiter say in that respect?

A It had to do with an accident, it had to do with an accident." (VII, 1249)

The foregoing testimony is prejudicial to Weinstein. It is hearsay. It has no relation to any count in the indictment. It occurred subsequent to the last overt act alleged.

The court recognized and acknowledged that objections were constantly made that hearsay was being admitted; that the court was instructing the jury that it was entitled to use the statements of any conspirators against all defendants (X, 1915).

Nothing is clearer than that in every instance the right of the government to introduce hearsay testimony against conspirators not present wholly ceases and terminates at the end of the conspiracy. The conspiracy ends with the last overt act alleged and proved. The rule is stated in *Paoli v. United States,* 352 U.S. 232, 237, as follows:

"This Court long has held that a declaration made by one conspirator, in furtherance of a conspiracy and prior to its termination, may be used against the other conspirators. However, when such a declaration is made by a conspirator *after the termination of the conspiracy, it may be used only*

> *against the declarant and under appropriate instructions to the jury.*" (Emphasis added.)

An annotation to the *Paoli* case entitled "Admissibility as against conspirator of extrajudicial declarations of coconspirator—Supreme Court Cases," 1 L.Ed. 2d 1780, states flatly at 1792:

> "Ordinarily an improper admission of an extrajudicial statement of a conspirator is reversible error."

Cited as authority for the above statement are the following cases:

> *Logan v. United States,* 144 U.S. 263.
> *Brown v. United States,* 150 U.S. 93.
> *Sparf v. United States,* 156 U.S. 51.
> *Fiswick v. United States,* 329 U.S. 211.
> *Krulewitch v. United States,* 336 U.S. 440.

The *Krulewitch* case at page 444 (336 U.S.) referred to the admission of hearsay against a co-conspirator as "this *narrow exception* to the hearsay rule," and refused to expand the rule at the request of the government.

See also *Wong Sun v. United States,* 371 U.S. 471, 490; *Developments in the Law—Criminal Conspiracy,* 72 Harv. L. Rev. 922, 989-990.

A reading of the discussion between the court and counsel makes it clear that the court admitted the foregoing hearsay by reason of the insistence of the government that such was admissible.

The government argued that there was a *scheme to conceal* the fact that the collisions were planned by the

defendants and consented to by the occupants of the vehicles (VI, 1200; IX, 1746; X, 1915-1928).

We quote a small portion of the transcript to illustrate:

> "THE COURT: Now, take for example the one particular portion of the testimony that I recall where Mr. Knippel and Mr. Lasiter called on Mrs. Boisjolie while he was interviewed by Mr. Severtson.
> MR. BURBANK: Yes, sir.
> THE COURT: Which was on October 10, 1960.
> MR. BURBANK: That is right, sir.
> THE COURT: And after the May occurrence, that is an alleged as an overt act, the last overt act.
> MR. BURBANK: That is right, sir.
> THE COURT: Under the instructions I gave the jury at that time I said this applied to Count IX against the other co-conspirators if the government, in fact, subsequently has proved the conspiracy, didn't I?
> MR. BURBANK: That is right, sir.
> THE COURT: Was I in error?
> MR. BURBANK: I don't think so." (X, 1923)

The government was proceeding on the theory that concealment alleged in the indictment continued the conspiracy up to the time of the filing of the indictment on January 20, 1961.

It appears that the court was led into error by the government.

The law is very clear that a conspiracy is not continued by showing such concealment:

Krulewitch v. United States, 336 U.S. 440
Grunewald v. United States, 353 U.S. 391
Lutwak v. United States, 344 U.S. 604

The prejudicial nature of the foregoing testimony cannot be overemphasized.

In *Wong Sun v. United States,* 371 U.S. 471, 490, the court stated:

> "And where post-conspiracy declarations have been admitted, we have carefully ascertained that limiting instructions kept the jury from considering the contents with respect to the guilt of anyone but the declarant."

The court cited as authority:

> *Lutwak v. United States,* 344 U.S. 604, 618, 619; *Paoli v. United States,* 352 U.S. 232, 236, 237.

It is obvious herein that no such limiting instructions were given to the jury. To the contrary, the trial judge made it clear that he had admitted the above post-conspiracy declarations against all defendants.

* * * * *

At the end of the testimony Weinstein moved as follows:

> "The defendant Weinstein moves for a judgment of acquittal or, in the alternative, for a mistrial on the grounds that no conspiracy has been proved and no jury can possibly remove from consideration all of the prejudicial evidence which has been allowed in this case pursuant to Count IX.
>
> * * * *
>
> "The defendant Weinstein also moves for a judgment of acquittal and unless the Court denies that, in the event the Court denies that motion for a mistrial on the ground that the Court allowed in evidence, hearsay statements subsequent to the termination of any alleged conspiracy as stated in Count IX and subsequent to the last overt act

which was pleaded in Count IX on the grounds that there can be no furtherance of a conspiracy." (XXIX, 5680, 5681)

The motions were denied (XXIX, 5689).

However, just before denying the motions, the court stated it agreed with counsel that hearsay statements made after the termination of the conspiracy should not be used in any manner in furtherance of the conspiracy. The court agreed that concealment could not be an overt act extending the conspiracy. The court then went on to say it was of the opinion that it had instructed the jury by means of cautionary instructions that the hearsay statements applied only to those persons present *after a certain date*. However, *the court recognized that the termination date had never been mentioned to the jury*. The court then denied all motions, stating it did not desire to hear any argument (XXIX, 5687-5689).

Just before instructing the jury, the court went over the instructions with counsel. The court stated that it had changed its proposed instruction on conspiracy "to provide that the conspiracy is not ended until the date of the last overt act and proven. I realize that the United States doesn't like this but I think its the safest and best way to instruct the jury and then they will understand it. Are we ready?"

Weinstein's counsel then asked the court if it was "going to instruct [the jury] that definitely the conspiracy ended at the time of the last overt act, if there was a conspiracy at the time of the last overt act alleged in the indictment?"

The court stated: "Alleged and proven."

Weinstein's counsel then asked the question: "Alleged and proven?" To this there was no answer by the court. (XXIX, 5769) The court then went on to instruct the jury.

While instructing, the court read *in haec verba* the entire indictment.

Thus, the jury was told that in the conspiracy count (Count IX) that "Each and all of the overt acts of the defendants and their co-conspirators alleged in Counts I through VIII of this indictment, inclusive, are hereby realleged and incorporated by reference herein and designated as *overt acts* in furtherance of the conspiracy." (XXX, 5829)

Of course the jury was further told by a reading of the indictment that *in each of the first eight counts* was the following:

> "It was further a part of said scheme to defraud that the said defendants would *conceal* that the collision was planned by the defendants and others whose names are to the grand jury unknown and consented to by the occupants of said vehicles in advance of its occurrence." (XXX, 5816-5830).

The court then clinched it by later instructing the jury further:

> "You will recall that the conspiracy charged here alleges all of the overt acts done by the defendants, or any of them, in all of the previous counts as well as five different items." (XXX, 5860)

Without question all this made the *concealment* feature an integral overt act. Of course the court never

told the jury when the concealment would cease to be an overt act.

All the court said in instructing as to the ending of the conspiracy was the following:

> "A conspiracy is not ended until the date of the last overt act alleged and proven." (XXX, 5861)

The court also instructed the jury that the hearsay statements made during the existence of the conspiracy by one of the conspirators could be considered against the others (XXX, 5865).

Weinstein excepted to the instructions on conspiracy, the ending of conspiracy, and hearsay, as follows:

> "Page 28 where the Court is talking about conspiracy and overt acts and when the conspiracy ended, I realize that the Court changed its instruction over the way that it was originally submitted, but the Court has still failed to tell the jury when the conspiracy ended by telling them about when the last overt acts was committed or when the last overt act was committed that was proven in this case. So, the jury has been, I feel, allowed to speculate on this whole matter of the ending of this supposed conspiracy and that this conspiracy, as I sat here and listened to these conspiracy instructions, I feel that the whole matter is so vague and unsure in the jury's minds that I am convinced that they haven't the slightest conception, Your Honor, of when this conspiracy, if it ever started, ended, as to what can be used as evidence on the time factor and what evidence can be used and what cannot be used.
>
> Much of the evidence in this case or some of the evidence, at least, that would be important on this conspiracy matter was never identified as to the exact date and even if the Court in this case did

tell the jury that the conspiracy ended at a particular date the jury would still be unsure and unable to know whether some of the conspiracy happened before or after that date but, at any rate, I feel that the Court should have told the jury specifically when the conspiracy ended, I feel that is the function of the Court." (XXX, 5889, 5890)

Damaging hearsay testimony was admitted against Weinstein which could not have been other than extremely prejudicial. The following language from *Blumenthal v. United States,* 332 U.S. 539, 551, is particularly appropriate here:

> "If therefore it were shown, or even were doubtful, that the admissions had been improperly received as against Blumenthal, Feigenbaum and Abel, reversal would be required as to them."

SPECIFICATION OF ERROR NO. VII

The Trial Court Erred in Instructing the Jury on Proof of the Existence of a Conspiracy.

The court instructed the jury as follows:

> "Persons may be guilty of being parties to a conspiracy though the objects of the conspiracy were never accomplished. On the other hand, proof concerning the accomplishment of the objects of a conspiracy is the most persuasive evidence of the existence of the conspiracy itself. * * * ." (XXX, 5862)

To this instruction Weinstein excepted as follows:

> "I feel that this is a prejudicial instruction and I do not think that it's the law, at least, I have never run into that. And I feel that to allow the jury to look and to say, 'Well, the objects of this conspiracy as it would appear the government wants us to think it existed, were accomplished is persuasive evidence that it existed.'

"In the first place, I feel it is lifting yourself by your own bootstraps." (XXX, 5891)

This instruction could not be correct. The object of the alleged conspiracy was obviously to obtain settlement money from insurance companies. The evidence clearly showed that various sums were obtained in settlement of the collisions alleged in the various counts. Thus, the court by the above instruction directed a verdict of guilty on the conspiracy count.

Suppose for the moment that the collisions had been legitimate; that the various persons involved with injuries collected claims from the same insurance companies. Such would have been an innocent and proper act. Yet, pursuant to the above instruction, the jury would have been told to bring in a verdict for the government, by reason of the fact that the OBJECT of settlement for injuries from the insurance companies would have been obtained.

The instruction cannot be the law. The instruction is misleading and highly prejudicial. It, in effect, directed a verdict of guilty by reason of the mere fact that money was obtained from insurance companies.

SPECIFICATION OF ERROR NO. VIII

The Trial Court Erred in Limiting Oral Argument by Weinstein to One Hour.

In its instructions to the jury, the court stated:

"I need not remind you that this case bristles with issues of veracity. In instances too numerous

> to specify, the testimony of the witnesses called by the government is flatly contradicted by the testimony of the defendants * * * ." (XXX, 5849, 5850)

The government called 84 witnesses. Weinstein called 25 witnesses; making a total of 109 witnesses. Exhibits received in evidence consisted of 247 marked as government exhibits and 160 marked as exhibits for defendants, a total of 407 exhibits. The trial commenced September 13, 1961, and ended November 10, 1961. The reporter's transcript is in excess of 6,000 pages. Toward the end of the trial the court proposed giving an aggregate total of four hours to all ten defendants for final argument (XXVI, 5199). One of the attorneys suggested that ten hours would be required, to which the court replied:

> "THE COURT: Oh, that is too much, I am not going to allow that. You wanted to know what my idea is and I have given it to you. I don't intend to invite argument on it, counsel." (XXVI, 5200).

Near the close of the testimony, the court was upset because the taking of testimony had not ended that day (Friday) (XXVIII, 5585, 5588, 5589).

The court stated:

> "THE COURT: I hoped that we would be through in time tonight so that I could give you some sets of instructions that I prepared besides the verdict form but I am not going to do it until the testimony is through, if ever, I mean if it is ever through, not that I will ever give it to you." (XXVIII, 5590)

Thereafter the court remarked that its estimate for the time of argument was adequate (XXVIII, 5592); the court stated it was allowing a total of four hours to all

ten defense counsel (XXVIII, 5593). The following then transpired:

> "THE COURT: Well, I think defendants' counsel should confer and decide how they want to divide up the time if there is any possibility of it.
>
> MR. GROSS: We are being given, as I understand it, four hours.
>
> THE COURT: That is right.
>
> MR. GROSS: That is twenty-four minutes and divided by the number of clients, twenty-four minutes apiece for argument. As far as I am concerned that would be the very least that I would take.
>
> MR. DWIGHT SCHWAB: Your Honor, there is hardly any use in defendants' counsel conferring on that because I am sure that no one is going to be able to give up twenty-four precious minutes or any portion thereof. In a case like this that has gone on this length of time you can hardly get started in twenty-four minutes and for the government to have two hours and to give each of these defendants' counsel twenty-four minutes I think is grossly unfair.
>
> THE COURT: What do you think you ought to have?
>
> MR. DWIGHT SCHWAB: I think the government ought to have twenty-four minutes, too, or something close to it.
>
> THE COURT: Now, let's be reasonable, counsel, what do you think you ought to have?
>
> MR. DWIGHT SCHWAB: Your Honor, I think that every counsel here should have at least forty-five minutes to put on his case to make his arguments. Almost any case that is argued over in the Circuit Court that takes two days to try, there is few lawyers argue less than forty-five minutes." (XXVIII, 5593, 5594)

The court then indicated it might give Weinstein and George Barnard more time, but the court could not see

everybody arguing for an hour or even forty-five minutes (XXVIII, 5594, 5595).

Weinstein then urged the court to hear argument on motions at the end of the evidence, and asked the court if the court would listen. [The court had requested no argument on motions at the end of the government's case (XIX, 3669).] The court indicated it was not disposed to listen to argument (XXVIII, 5595).

Later the court said:

> "And in view of the fact that your man [George Barnard] is named in nine counts, in view of the fact that Mr. Weinstein has presented by far the greater amount of testimony in the case in his own defense, I feel that there should be additional time allowed to you [George Barnard] and additional time allowed to Mr. Schwab." (XXIX, 5664)

Thereafter the court granted each of the defendants 30 minutes for final argument except Weinstein and George Barnard, one hour each (XXIX, 5696).

Defendant Johnstone (Count III) through his attorney Paulson objected. The court replied:

> "Is there anything you wouldn't object to?" (XXIX, 5696)

At the beginning of argument, Weinstein's counsel stated to the jury:

> "To begin with when we have been going here for as long as we have somewhere between seven and eight weeks I think you realize as well as I do that in an hour it is just impossible to just anymore than hit the high spots, and that is what I am trying to do, I am going to try to get over as much as I can in the time that has been allotted. * * * ." (XXIX, 5725)

After 55 minutes of argument, the court stated:

> "Five minutes more.
> MR. DWIGHT SCHWAB: Thank you, Your Honor." (XXIX, 5750)

Shortly after, upon indication from the court, Weinstein's counsel stated:

> " * * * is my time up, Your Honor? Just one moment." (XXIX, 5756)

Thereafter, Weinstein excepted to the limitation of argument as follows:

> "I further, and this is beyond the instruction, would like to except to the limitation of argument in this case as a denial of counsel under the Sixth Amendment of the United States Constitution to fully argue the case to the jury. I felt yesterday, although the Court granted an hour for argument, that I was just barely able to skim the issues, particularly in a case that started before the middle of September and has gone on as long as this one has and has involved a number of witnesses and a number of exhibits, not only the number of exhibits but the voluminous character of a lot of those exhibits, that to attempt to argue the case in that length of time to the jury and more than just barely skim the surface is impossible." (XXX, 5891, 5892)

It was obvious that the court intended to drastically limit argument—that no full-scale argument would be allowed. It cannot be properly suggested that Weinstein's counsel indicated to the court that adequate argument could be presented in anywhere near 45 minutes. Exhortation with the court was futile. The court was most insistent on concluding the case quickly, and made clear its intention so to do.

What was a proper length of time to allow Weinstein to argue a case that "bristled with issues of veracity," under the circumstances?

In *Rossi* v. *United States,* (CA 8) 9 F.2d 362, over objection of defense counsel, he was limited to 15 minutes oral argument. The Circuit Court reversed and ordered a new trial, holding an abuse of discretion. There were 13 witnesses and the evidence covered 54 printed pages. There was one transaction involved, i.e., a narcotics buy on a street corner. In addition, the defendant's counsel wanted to discuss the credibility of one witness.

In the *Rossi* case, in arriving at what was unreasonable, the court reviewed a number of state decisions as follows: *White* v. *People,* 90 Ill. 117, 32 Am. Rep. 12 (9 witnesses, limitation 5 minutes); *McLean* v. *State,* 32 Tex. Cr. R. 521, 24 S.W. 898 (many witnesses, limitation 17 minutes); *Jones* v. *Commonwealth,* 87 Va. 63, 12 S.E. 226 (17 witnesses, limitation thirty minutes); *Walker* v. *State,* 32 Tex. Cr. R. 175, 22 S.W. 685 (12 witnesses, limitation 45 minutes); *Huntley* v. *State,* (Tex. Cr. App.) 34 S.W. 923 (11 witnesses, limitation 15 minutes); *People* v. *McMullen,* 300 Ill. 383, 133 N.E. 328 (limitation 35 minutes); *People* v. *Green,* 99 Cal. 564, 34 P. 231 (24 witnesses, limitation one hour); *State* v. *Rogoway,* 45 Or. 601, 78 P. 987, 81 P. 234 (22 witnesses, limitation one hour). (9 F.2d 362, 368).

It would seem obvious that if 15 minutes is too short a time to comment on one fleeting narcotics buy plus credibility of one witness, one hour to comment on 50 to 100 factual questions extending over an 18-month pe-

riod plus the credibility of dozens of witnesses, is patently unreasonable.

In *York* v. *United States,* (CA 6), 299 F. 778, 20 minutes was allowed for argument. The evidence was circumstantial. The trial had taken a part of two days. There were important differences of recollection between court and counsel as to testimony. The evidence covered 233 pages when transcribed. This was held to be reversible error.

In *Parker* v. *United States,* (CA 6), 2 F.2d 710, the trial court was held to have unreasonably restricted the time of argument. The Court of Appeals stated at page 711:

> "There were 12 witnesses at the trial. It lasted during the day. The charge was felony, and resulted in conviction and sentence of a year in the penitentiary. The importance of the issues and the conflict of proofs did not justify summary treatment. Defendant's counsel was allowed only 20 minutes for argument."

One of the state court cases relied on in the *Rossi* case (9 F.2d 362) is *State* v. *Rogoway,* 45 Or. 601, 78 P. 987, 81 P. 234. The opinion is by Justice Robert S. Bean (later Judge of the United States District Court for the District of Oregon). In the original opinion, Justice Bean felt that although one-hour argument time to which defendant's counsel was limited was quite short, nevertheless it was not an abuse of discretion. However, on rehearing, Justice Bean ruled that the Sixth Amendment gives an accused the right to the assistance of counsel for his defense. "This means that the accused shall have

the right to be fully and fairly heard, or else it means nothing. Anything less would be an invasion and restriction of the right guaranteed." (45 Or. at 612)

Quoting from another case, Justice Bean continued:

> " ' * * * it may be regarded as settled law in American courts that any abridgement of this right which deprives the accused on trial of the time necessary to make his defense fully and fairly is an error, for which a new trial will be granted; * * * .' "

As an appropriate yardstick to be applied, Justice Bean quoted from *People* v. *Green,* 99 Cal. 564, 34 P. 231, to the effect that the limit of argument is reached when counsel ceases to " 'confine its range to the facts and law of the case,' " but that " 'while counsel speak to the point, and proceed in good faith, wasting no time, how can the court forbear to be patient, and hear what is said? When it is manifest that the discussion is complete and the subject exhausted, a stop may be ordered.' " (45 Or. at 613)

That the factual situation in *State* v. *Rogoway* is pertinent is shown by the following quotation from page 614, (45 Or.):

> "It required the greater part of three days to try the case. There were twenty-one or twenty-two witnesses examined, the testimony of whom, when transcribed and typewritten, filled a volume of 160 pages, and there were fifty-one exhibits introduced in evidence. Much of this testimony was circumstantial and conflicting, and the case was attended with many complications that required careful analysis on the part of counsel both for the State and for the defendant. Notwithstanding this, the court, at the close of the testimony, informed counsel that

> but one hour would be allowed on a side for the argument of the case." (45 Or. at 614)

State v. *Mayo,* 42 Wash. 540, 85 P 251, was decided on federal constitutional grounds. The trial court limited argument to an hour and a half on each side. The trial consumed something more than four days; 20 witnesses were examined; the evidence made a typewritten transcript of nearly 500 pages. The Washington Supreme Court reversed.

A recent case is *State* v. *St. Clair,* 3 Utah 2d 230, 282 P.2d 323. There nine witnesses were called by the state and seven for the defendant, a total of 16. In reversing conviction, the court stated as follows (331, 332 of 282 P.2d):

> "In the case at bar nine witnesses were called on behalf of the State and seven for the defendant, a total of sixteen."

The court then continued:

> "The forty minutes allowed for argument would give less than three minutes per witness for discussion of the testimony, without allowing any time for the necessary generalities in opening and closing and presenting the over-all application of the theory of the defense and the conclusion to be drawn therefrom."

The court then added:

> "Expedition in trials is to be commended, yet it should not be allowed to sacrifice thoroughness, nor a full and careful coverage of every essential part of the proceeding."

See also *State* v. *Ballenger,* 202 S.C. 155, 24 S.E. 2d 175.

All of the evidence against Weinstein was circumstantial. Basically Weinstein was caught in a web of guilt by association. No witness said "Weinstein knew these accidents were staged," or the like. However, by surrounding him with several dozen guilty defendants and conspirators—by showing that Weinstein represented many of them—that he paid many of them money—by weeks of hearsay and innunendo—Weinstein was presented with a monumental task of disassociation and explanation.

Actually, there were only about eight government witnesses that had anything of consequence to say about Weinstein (See Appendix, Infra, 178). But, in order to get this most significant fact across to the jury at the end, Weinstein had to carefully review with the jurors what the many other government witnesses had really said—and more importantly, what they *had not said*. The jurors could not do this themselves. This is peculiarly the job of counsel.

After disassociating himself from the testimony of the great mass of witnesses, analysis could then be made of the testimony of the eight government witnesses who *had* something to say about Weinstein. Without this, Weinstein remained where he was placed by the mountain of undigested evidence—inexorably tangled and entwined with a group of petty criminals.

The same process was required with the government exhibits. Here, again, the quantity of documents and papers, many of which related to, or were originated by Weinstein, was bound to be confusing to the jury, unless

Weinstein could adequately discuss them. If he had had time he could explain and show that many of them really meant nothing as far as he was concerned—that those that did had a proper purpose and a logical explanation.

This could not be done by means of sweeping generalities. Painstaking, perhaps time-consuming, analysis and explanation was the only feasible method. To perform this task is one of the main purposes for having a lawyer.

So too with Weinstein's own evidence. It extended for over 1000 pages (XXI, 4182 - XXVII, 5226).

He called 25 witnesses.

He introduced approximately 100 exhibits.

It too required careful analysis and explanation to show where each witness and exhibit was important, and how such related to the government evidence.

For one example, doctor and hospital reports were introduced on practically every Weinstein client involved. All these indicated injury—some permanent in nature. The importance of these as relating to Weinstein's guilty knowledge required careful explanation and analysis in relation to the testimony of the various government witnesses. — Each Weinstein exhibit had significance. Without explanation, the purpose was completely lost on the jury; in fact, his exhibits merely added to the confusion, mass and clutter.

It is no answer to say that the government with 10 defendants had only a couple of hours of time to argue. The government had the advantage of Weinstein's being

surrounded by nine active co-defendants, against all of whom there was direct evidence of guilt. The government also had the advantage of five additional confessed defendants, all of whom testified to their guilt. In addition, the government had many co-conspirators who confessed guilt on the stand, or against whom there was direct evidence of guilt. The majority of these people had been Weinstein's clients and Weinstein had paid money to them. The government did not need to argue at all. The burden at that point was truly on Weinstein to explain and to cleanse himself in the eyes of the jury.

Weinstein did not ask to be tried *en masse*. The government insisted over his continued protest. (See Specification of Error No. II, supra.) Therefore, the least Weinstein could expect was that his attorney be accorded enough time to systematically assimilate and analyze *all* the evidence, so it would not be dumped, a half-digested, prejudicial and confusing mass, on the jury.

Anything less was a deprivation of his constitutional rights under the Sixth Amendment. One hour was unreasonable under *any* standard of measure.

SPECIFICATION OF ERROR NO. IX

The Matters Involved Were Primarily of Local Concern

Just before commencement of the trial Weinstein filed a motion which stated in part as follows:

> "Independently of the foregoing grounds and the grounds set forth in my previous motion for a separate trial I urge this:
>
> (1) I have been a resident and citizen of the State of Oregon since my birth.

(2) The crimes with which I am charged are in substance matters of local concern. The fact of the indictment shows that any violation of federal criminal law is merely incidental and is being used by the government to try me in federal court on charges which, if true, should be brought against me in state court." (R. 84)

On the same day that he filed the motion, Weinstein told the court in argument of the motion as follows:

> "One other thing, your Honor, that I think hasn't been mentioned that I think should be mentioned, at least, I am going to have more to say on later on in the trial, I think there is little question that if there is an offense stated here at all, that it is a violation of State law, and that Federal law is being dragged in by the weakest of links. The United States Supreme Court has had several things to say about trials for mail fraud where actually the basic violation was a violation of State law. As I say, if there was to be a trial in this case, it should have been in State court. Under Oregon law, as was pointed out in our motions, there is no question that each and every one of these defendants was entitled to a separate trial. That has been the law of Oregon since before Oregon became a State. It's the law of Oregon today, and by the more or less device of bringing this case as a mail fraud case in Federal Court is the only reason that my client cannot have a separate trial, which he would certainly be entitled to as a matter of right, and he could not and he should not be denied it in Federal Court." (I, 36, 37).

This case is a prime example of federal encroachment on local law. Bizarre attempts were made to make it appear that a large, vicious nation-wide "syndicate" was the target of the prosecution, (e.g. VI, 1120; VIII, 1557; IX, 1672, 1739, 1743).

Before the government rested however, it became obvious that the court was dealing with a handful of "local two-bit crooks." There was no substantial evidence of anything beyond that. There was no substantial reason for the federal government to inject itself into the picture. Oregon authorities could have easily and efficiently dealt with the matter under local law.

However, as pointed out elsewhere, Weinstein was the prime target. The only way he could be enmeshed was in a long conspiracy trial, thus sinking him in hearsay and confusion.

Surely the mails were used, but the use of the mails here was akin to violation of tax laws by the extortionists in *Rutkin* v. *United States,* 343 U.S. 130. It was a wholly casual, incidental use of the mail with no sinister implications. In the *Rutkin* case, Mr. Justice Black, writing for four of the Justices, wondered why the government bothered with what was primarily local law violations and answered his own question thusly: at page 141 of 343 U.S.:

> " * * * the only other reason that occurs to me—to give Washington more and more power to punish purely local crimes such as embezzlement and extortion. Today's decision illustrates an expansion of federal criminal jurisdiction into fields of law enforcement heretofore wholly left to states and local communities. I doubt if this expansion is wise from the standpoint of the United States or the states.
>
> In sofar as the United States is concerned, many think that taking over enforcement of local criminal laws lowers the prestige of the federal system of justice."

Justice Black then went on to point out reasons why the federal courts should not enter into matters of a local nature for whatever reasons may appear to be good and sufficient at the time, as follows: (Page 142 of 343 U.S.)

> "Federal encroachment upon local criminal jurisdiction can also be very injurious to the states. Extortion, robbery, embezzlement and offenses of that nature are traditionally matters of local concern. The precise elements of these offenses as well as the problems underlying them vary from state to state. Federal assumption of the job of enforcing these laws must of necessity tend to free the states from a sense of responsibility for their own local conditions. Even when states attempt to play their traditional role in the field of law enforcement, the overriding federal authority forces them to surrender control over the manner and policy of construing and applying their own laws. State courts not only lose control over the interpretation of their own laws, but also are deprived of the chance to use the discretion vested in them by state legislatures to impose sentences in accordance with local ideas."

The court points out that crimes such as extortion, robbery, embezzlement, and offenses of that nature, are traditionally matters of local concern. So too, obtaining money by false pretenses by a small gang of local bad men.

Justice Black ends up his opinion (next to last paragraph) with the following statement (page 147 of 343 U.S.):

> "My study of this record leads me to believe that the fantastic story of supposed extortion told here would probably never have been accepted by a jury if presented in a trial uncolored by the manifold other inflammatory matters which took up 887 of the 900 pages in this 'tax evasion' case."

So, also, had Weinstein been accorded a separate trial.

The proposition is well stated by this court in *Twitchell* v. *United States,* (CA 9) 313 F.2d 425, 428:

> " * * * It is not the business of federal prosecutors to prosecute for state offenses, or of federal courts to entertain such prosecutions. And we think that federal courts must be on guard against attempts to convert what are essentially offenses against state laws into federal crimes via the conspiracy route."

Weinstein cites this to the court being aware of the language of the court on page 429 concerning mail fraud cases.

CONCLUSION

The judgment should be reversed for the reasons aforesaid.

On the questions raised as to the admission and rejection of evidence, the instructions to the jury and the limitation of argument, it cannot be said that the error did not influence the jury, or have but very slight effect. *Kotteakos* v. *United States,* 328 U.S. 750, 764. *Griffin* v. *United States,* 336 U.S. 704, 709. *Hawkins* v. *United States,* 358 U.S. 74, 79. *Thurman* v. *United States,* (CA 9), 316 F.2d 205, 206.

Respectfully Submitted,

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APPENDIX

In the foregoing Specification of Error No. I entitled "The Trial Court Erred in Denying Weinstein's Motion for Judgment of Acquittal," Weinstein viewed all of the evidence from the standpoint most favorable to the government. All witnesses were assumed to be speaking the truth. In many instances, this was a violent assumption, but nevertheless made.

It is now necessary to set forth evidence which bears out Weinstein's contention that he did not know the collisions involved were staged—that he was himself a victim. This is of importance for the following reasons:

1. Where evidence of guilt is weak and questionable, then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt:

Glasser v. United States, 315 U.S. 60, 67.
Fiswick v. United States, 329 U.S. 211, 220.
Kotteakos v. United States, 328 U.S. 750, 763.
Krulewitch v. United States, 336 U.S. 440, 445.

2. In the statement of the facts in connection with the specification of error on the insufficiency of the evidence (No. I), Weinstein bent over backward in viewing the evidence most favorably to the government. Cases of doubt were resolved against Weinstein. Therefore, a portion of the evidence hereafter set forth in this Appendix may well be of a character that can be

considered by the court in connection with the motion for judgment of acquittal.

3. In *Lyda v. United States,* (CA 9) 321 F.2d 788, this court, in discussing the matter of credibility of an accomplice, said at page 795:

> "Obviously there comes a point when the witness' qualifications are so shoddy that a verdict of acquittal should have been directed."

In many cases testimony of government witnesses was "incredible or unsubstantial on its face."

4. Also, the matters set forth in this Appendix have a bearing on the specification of error relating to the limitation on argument (No. VIII). If ample time had been granted to fully argue this case, the matters as set forth in this Appendix could have been gone into fully and explained to the jury.

EVIDENCE SHOWING THAT WEINSTEIN HAD NO CRIMINAL KNOWLEDGE—THAT HE HIMSELF WAS A VICTIM OF A GROUP OF MINOR CRIMINALS IS NOW SET FORTH.

It is discussed under the following heads:

I—No one told Weinstein that the collisions were staged—no one testified that Weinstein knew the collisions were staged.

II—A number of the participants were actually injured.

III—Medical reports showed injuries to all, and a number of the "victims" were hospitalized.

IV—Police reports showed no suspicious circumstances.

V—Weinstein was fooled, and so were a lot of others.

VI—All persons dealing with Weinstein, even in an adverse capacity, said he was fair and honorable.

VII—Weinstein's conviction necessarily rests on the testimony of admitted perjurers and liars; persons with strong reason to favor the government in testimony against Weinstein.

VIII—Weinstein was the prime target.

IX—Weinstein processed and handled the staged collision cases the same as he handled all of the rest of his cases—He had a tremendous volume of business.

I

No One Told Weinstein That The Collisions Were Staged—No One Testified That Weinstein Knew The Collisions Were Staged.

There is considerable testimony that Weinstein was misled as to the character of several of the collisions by the participants. Being less than honest with one's own attorney is not anything new. Witnesses affirmatively testifying as to their attempts to mislead Weinstein, or as to his lack of knowledge, are:

Counts I, II and III—Weinstein not involved.

Counts IV and V—Gordon McCoy (IX, 1676-1678); Keith Rose (X, 1844).

Count VI—Mr. Deegan (III, 463, 464, 472, 473, 480); Mrs. Deegan (IV, 689, 709, 710, 718); Ray Carskadon [Deegans' attorney] (XXVI, 5180, 5181).

Counts VII and VIII—No evidence.

Collision of January 7, 1959—No evidence.

There is no testimony that anyone told Weinstein about any collision being staged.

There is no testimony that Weinstein knew any collision was staged.

II

A Number of the Participants Were Actually Injured.

Despite the nature of the collisions, many of the participants received actual injury. Of course Weinstein knew of the injuries. Such knowledge would allay any possible suspicion.

Leland and Geraldine Deegan:

Although they were doing their best to disclaim all injury, both Deegans were hurt. Dr. Joe Davis, an outstanding orthopedist (XXII, 4385-4387, 4390, 4398), and Dr. Gregg Wood (XXII, 4230, 4231, 4248, 4250), both found involuntary muscle spasm in both Deegans. Dr. Wood's first examination was nearly four months after the collision (XXII, 4228).

Darrel Saunders:

Dr. H. Freeman Fitch found injury—objective findings (Exs. 147-A B B, 479). Saunders had muscle spasm in his neck (XXIII, 4418, 4457).

Keith Rose:

Rose told Weinstein on his first visit to his office that he was seriously hurt (IX, 1760). He testified he was really hurt (X, 1808, 1814). He was actually treated by seven doctors in all (X, 1826-1834). He was in the hospital for ten days (X, 1829).

Gordon McCoy:

Gordon McCoy admitted he had injury (IX, 1641, 1646, 1648, 1656).

Dr. Howard Cherry, also an outstanding orthopedist in the Portland area, testified that McCoy was hurt (XXIII, 4501, 4530, 4533); his office file so shows (Exs. 148, 483).

John Barnard:

Dr. Paul Campbell, orthopedist, the treating doctor, found injury to Barnard (Ex. 490-A); also Dr. Lester E. Chauncey, the insurance company examining doctor (Ex. 490-B). Weinstein had previously represented Barnard and knew his pre-existing physical condition as shown by 1957 medical reports (Exs. 480, 481).

Ronald Allison:

The investigating police officer stated in his report

that Allison had major injuries (Ex. 431; XII, 2383). James Minor, the investigating insurance adjuster of 25-years experience (XIV, 2605, 2606), said *Allison's injuries were apparent* (XIV, 2652); he visited Allison at the hospital (XIV, 2653); Weinstein also visited Allison at the hospital (XXIV, 4750). Dr. Joe Davis reported to Weinstein that Allison had permanent injuries (XXIII, 4408).

James Page:

James Page (Counts VII and VIII) had objective findings of injury (Exs. 477-A and B).

Conrad Kerr:

Kerr, a government witness, testified over a year and a half after the collision, and stated he was still injured (XVII, 3250). He was a patient in Portland Sanitarium Hospital 28 days, where he was in traction (XVII, 3261, 3262).

III

Medical Reports Showed Injuries to All, And a Number of the "Victims" Were Hospitalized.

Two expert witnesses testified as to how the average lawyer in the Portland area representing personal injury clients would handle cases coming to him (John D. Ryan, XXIV, 4610; Nels Peterson (XXV, 4900). The testimony of both witnesses showed that plaintiff's attorneys necessarily place great reliance on the contents of medical and hospital reports.

Leland Deegan and Geraldine Deegan:

Dr. Joe Davis (Exs. 467, 469) and Dr. Gregg Wood (Exs. 466, 468), both showed objective findings of injury in written reports to Weinstein. Physiotherapy was prescribed with Dr. Arthur Jones (XXII, 4389) and St. Vincents Hospital. Back braces were prescribed (Exs. 467, 469; XXII, 4399).

Darrel Saunders:

Saunders was hospitalized at Providence Hospital for about a week; the hospital record shows injury (Ex. 474); Dr. H. Freeman Fitch wrote a report to Weinstein showing objective findings of injury (Ex. 479).

Ronald Allison:

Allison had a long hospitalization at Providence Hospital; the hospital record shows injury (Ex. 471), as do the reports from Dr. Davis to Weinstein (Exs. 478-A and B). Allison was examined by two insurance company doctors, copies of whose reports had been given to Weinstein. Both insurance reports show injury (Exs. 491-A and B).

John Barnard:

Weinstein had medical reports from John Barnard's doctor showing injuries which indicated serious trouble (Ex. 490-A), as well as from the insurance company's doctor (Ex. 490-B; XXIV, 4745).

James Page:

Page was hospitalized for a considerable period; his hospital records indicate injury (Ex. 475). Weinstein had medical reports from Dr. Davis, the treating doctor, which show injury (Exs. 477-A and B).

Weinstein also had copies of medical reports from doctors who examined Page for the insurance company, being Dr. F. A. Short (Ex. 492-A) and Dr. Lester Chauncey (Ex. 492-B); both show injury to Page.

Gordon McCoy:

McCoy was hospitalized in Providence Hospital. His hospital record shows injury (Ex. 473). Attorney medical reports from Dr. Howard Cherry, three in all show injury, (Exs. 482-A, B and C).

Keith I. Rose:

Rose was hospitalized ten days in Providence Hospital (X, 1829); his hospital records show injury (Ex. 476).

Conrad Kerr:

Kerr was a patient in Portland Sanitarium Hospital for 28 days following the collision (XVII, 3261).

There can be no doubt that a busy, experienced personal injury lawyer with the foregoing medical information would reasonably assume the legitimacy of the collisions in question, with never a contrary thought. It seems inconceivable that all these people would inten-

tionally permit themselves to be maimed! Apparently that is what happened here.

IV

Police Reports Showed No Suspicious Circumstances

Much reliance is placed by plaintiff's attorneys on the report of the investigating police officers. As to the three collisions in the indictment which involved Weinstein:

> The police report for the collision on August 18, 1958, (Counts VII and VIII) is Exhibit 431.
>
> The police report for the collision of September 11, 1958 (Count VI) is Exhibit 402.
>
> The police report for the collision of October 16, 1958, (Counts IV and V) is Exhibit 412 Id. Testimony concerning the report was given by the investigating officer (VI, 1058-1063). [The report could not be offered in evidence because of notations added in red (VI, 1062-1063)].

None of the reports raise any suspicion—to the contrary, they would allay any suspicion.

V

Weinstein Was Fooled And So Were A Lot of Others.

Weinstein was the victim of this small group of clients. He was fooled the same as a sizable number of insurance companies, executives and adjusters, attorneys, doctors and hospitals.

Weinstein was an experienced attorney, but so were the other victims experienced in their respective fields.

It might be said perhaps that all should have known better—should have recognized what was happening. BUT EACH AND EVERY ONE OF THE FOLLOWING WERE FOOLED, JUST AS WEINSTEIN WAS FOOLED:

Insurance Companies:

All of the following insurance companies paid out money, some in substantial amounts, to participants in staged collisions, as alleged in the indictment. In most instances, there was thorough investigation on the part of the company in advance of payment, and the company was in possession of considerable information concerning the matter:

1. Pacific Indemnity Company (XVII, 3275-3324).

2. Iowa National Mutual Insurance Company (Count VI).

3. State Farm Mutual Insurance Company (Counts IV and V).

4. Aetna Insurance Company (Counts IV and V).

5. Fireman's Fund Indemnity Company (Counts VII and VIII).

6. America Fore Loyalty Group (XVIII, 3536-3544).

7. Indiana Lumbermans Mutual Insurance Company (XIV, 2754-2778).

8. National Farmers' Union Property Casualty Company (XVII, 3324-3327).

9. Royal Indemnity Company (Count III).

10. Auto Club of Southern California (XIV, 2709-2727).

11. Commercial Insurance Company of Newark, New Jersey (Counts I and II).

Executives and Adjusters:

The following executives and adjusters for insurance companies handled or investigated the six collisions which were the subject of evidence herein. Most of them were men of considerable training and experience, holding responsible positions with their companies. Most of them were government witnesses. In cross-examination, Weinstein developed a mass of testimony as to the details and quantity of investigation that was conducted on the collisions in question. In three instances, the insurance company concerned referred the matter to the Index Bureau for further check (V, 999, Count VI; XIII, 2450, Count III; XIV, 2651, Counts VII and VIII). Nevertheless, these trained insurance investigators, looking at the claims from the adverse standpoint, despite all of the assistance they had and the facilities and experience at their disposal, still went ahead and paid the claims. Unfortunately, as Weinstein points out in Specification of Error No. VIII, supra, he was unable to properly assimilate or argue these important matters to the jury by reason of the drastically reduced time permitted for final argument.

The executives and adjusters are:

1. *Claude McLoud,* branch claims manager for the

Iowa National Mutual Insurance Company (V, 912-VI, 1009).

2. *Robert Perrin,* branch claims supervisor for Iowa National Mutual Insurance Company (VI, 1009-1029). There was a complete investigation by Crawford and Company, insurance adjusters, of the claims arising out of Count VI, (V, 998); the claims were referred to the Index Bureau (V, 999); depositions of all of the claimants were had (VI, 1003); all three claimants were medically examined by Dr. Paul Campbell, an orthopedist, examining for the insurance company (VI, 1004). Despite this, Perrin testified *there was nothing suspicious about the entire case; nothing unusual; everything appeared to be all right* (VI, 1018).

3. *James H. Minor,* claims manager, Fireman's Fund Insurance Company (XIII, 2553 - XIV, 2708). Minor handled the investigation of the collision set out in Counts VII and VIII himself; he was an old hand of 25-years' service (XIV, 2605-2606). He had medical reports on John Barnard, Page and Allison not only from two doctors of his own choosing, Dr. Short and Dr. Chauncey, who examined for the insurance company, but he also had a report from Dr. Joe Davis, Page's doctor, and from Dr. Campbell, John Barnard's doctor (XIV, 2633-2637); he checked on the claimants through a credit organization (XIV, 2614); he had the benefit of counsel with two leading insurance defense law firms in Portland (XIV, 2640-2642). *He saw nothing unusual about anything* (XIV, 2621).

4. *Ray Waterman,* claims manager, Pacific Indemn-

ity Company (XVII, 3275-3323). Waterman conducted a thorough investigation of the January 17, 1959, collision (XVII, 3313).

5. *Leo C. Lucas,* superintendent of claims for Loyalty Group Insurance, Counts I and II, (XIX, 3611-3623).

6. *Morris A. Dangott,* claims manager for Royal Globe Insurance Company (XII, 2223-2273; XIII, 2423-2456). Count III. Dangott conducted a very thorough investigation as shown by his testimony, even using a law graduate (XII, 2258).

7. *Crawford and Company* (Swett & Crawford). This company had branch offices all over the United States (V, 997). It investigated two of the collisions involved herein (V, 997; XIV, 2777).

8. *George Keith,* National Farmers Union Property Casualty Company (XVII, 3325-3327).

9. *John Pasley,* National Farmers Union Property Casualty Company (XVII, 3325-3327).

10. *Lawrence F. Kirkgasler,* staff adjuster, Pacific Indemnity Company (XVI, 3193-3197).

11. *Morton Kessler,* special agent, Indiana Lumberman's Mutual Insurance Company (XIV, 2754-2778).

12. *William H. Manspeaker,* claims representative, Auto Club of Southern California (XIV, 2709-2727).

Insurance Company Attorneys:

In each of the four cases in which Weinstein had

any connection, able and experienced defense counsel represented the involved insurance company. —On the other hand, the other two collisions (Counts I, II and III) were quickly settled and no attorney for any insurance company was ever involved. The attorneys involved were:

1. *William H. Morrison,* attorney with Maquire, Shields, Morrison, Bailey & Kester, Portland law firm. When Weinstein filed actions for the two Deegans and Saunders (Count VI), Morrison defended, along with attorney Thomas E. Cooney of his office (VI, 1001-1004).

2. *James K. Buell,* partner in the law firm of Phillips, Coughlin, Buell & Phillips, Portland. Buell defended the four actions brought by Rose and the three occupants of his car (Counts IV and V). The Rose case was tried, and the others settled. Buell's firm represents a number of insurance companies. Buell is a trial lawyer practicing since 1946. Buell was called as a witness for the government. Weinstein attempted to examine him as a character witness for Weinstein. The court refused to allow it. Buell would have been recalled as a witness for Weinstein if the court had not drastically curtailed the number of character witnesses Weinstein was allowed to call (VIII, 1496-1511).

3. *Wayne A. Williamson,* partner in the law firm of Mautz, Souther, Spaulding, Kinsey & Williamson, a large insurance defense firm in Portland (XIV, 2640). James Minor claims manager for Fireman's Fund consulted a great deal with Williamson concerning the

claims of John Barnard, Allison and Page (Counts VII and VIII; XIV, 2640). After Weinstein started actions for the three plaintiffs, and Williamson took depositions, he wrote Minor a letter and estimated the special damages that these three men would have. He ended his letter with the following:

> "A (Reading) 'Certainly it is well recognized that these are very dangerous cases and on a true value standpoint worth considerable money'." (XIV, 2650).

4. *George H. Fraser,* partner with the law firm of Hart, Rockwood, Davies, Biggs and Strayer, of Portland, a large firm that does considerable insurance defense work. By reason of a coverage question (Counts VII and VIII) it was necessary to get further representation from Fraser (XIV, 2642).

5. *Gordon Moore,* attorney with a large Portland firm, defended the insurance company on the three cases filed against George B. Wallace Company by Knippel, James Barnard and Kerr, arising out of the collision of January 17, 1959. The cases were all eventually settled (XVI, 3186-3192).

There is no evidence to indicate that any of these attorneys ever suspected there was anything wrong, and all of the claims were settled.

Automobile Owners:

In only two out of the six involved collisions were the owners of the striking cars at the wheel at the time of impact [Larry Haynes, (Count I; XIV, 2794)—Esther Howerton, (Count VI; IV, 755).] The other car

owners (all corporate) were apparently unaware of what was going on right up through the settlement of the case:

1. Singer Sewing Machine Company (Count III).

2. Howard Auto Supply (Count IV).

3. Wolfard Motor Company (Counts VII and VIII).

4. George B. Wallace Buick Company (Collision of 1-17-59).

Doctors:

The following doctors were involved in treating, or or examining for insurance companies, the various participants in the collisions. In no instance is there any evidence of suspicion on the part of any doctor. None of the reports indicate any irregularity, or suggestion that the patient was attempting to put something over on the doctor.

1. Dr. Gregg Wood (XXII, 4226-4272; Exs. 466, 468).

2. Dr. Howard Cherry (XXIII, 4486-4549; Exs. 148, 482-A,B.C, 483).

3. Dr. Joe Davis (XXII, 4380 - XXIII, 4483; Exs. 467, 469, 477-A and B, 478-A and B).

4. Dr. H. F. Fitch (XXIII, 4406; Ex. 479).

5. Dr. Edward Davis (X, 1828).

6. Dr. Arthur Jones (X, 1830; 4389).

7. Dr. W. Robert McMurray (X, 1830).

8. Dr. Paul Campbell (VI, 1004; XIV, 2633; XXIV, 4743; Ex. 490-A).

9. Dr. Edwin A. Mickel (X, 1832).

10. Dr. Lester Chauncey (XIV, 2636; Exs. 490-B, 491-B, 492-B).

11. Dr. F. A. Short (XIV, 2636; Exs. 491-A, 492-A).

12. Dr. John Dennis (X, 1833).

13. Dr. Francis Schuler (XVII, 3261).

14. Dr. R. A. Struthers (XXVII, 5312).

15. Dr. Kenneth Livingston (X, 1827, 1834).

16. Dr. J. A. Vickers (VI, 1059).

17. Dr. A. Puziss (XV, 2867; XVII, 3383).

18. Dr. Lester Eisendorf (X, 1957; XIII, 2452).

19. Dr. John Marxer (XVII, 3307-3310).

Hospitals:

A number of the participants were hospitalized or treated in the following hospitals. There is no indication of suspicion in any of the hospital records or on the part of the hospitals:

1. Providence Hospital (Exs. 471, 472, 473, 474, 475, 476—all hospital records).

2. Portland Sanitarium Hospital (XVII, 3261).

3. Physicians & Surgeons Hospital (XV, 2866; XVII, 3368; XVIII, 3404).

Court and Jury:

The lawsuit that Rose filed (Ex. 29) was tried in Multnomah County Circuit Court, resulting in a verdict for Rose after a week's trial (VIII, 1508).

All of the foregoing persons, organizations and institutions were fooled. Most of them were well-trained in their field. Many had financial interests antagonistic to the claimants. Weinstein, too, was fooled.

VI

All Persons Dealing with Weinstein, Even in An Adverse Capacity, Said He Was Fair and Honorable.

The trial involved much vindictiveness and bitterness. It is noteworthy that without exception, persons with whom Weinstein had dealt *on the very matters that were being litigated in this case,* who had been called as government witnesses, admitted on cross-examination that Weinstein had always dealt fairly with them. None of them testified to anything improper being done by Weinstein in connection with the case at issue.

Robert Perrin (Branch Claims Manager, Iowa National Mutual Insurance Co.):

Perrin was a star government witness, having been called to testify by the government on three different occasions. He exhibited great personal animosity toward Weinstein on his latter appearances as a witness.

Nevertheless, Perrin testified that Weinstein's word had always been good with him (VI, 1013); there was

nothing unusual in connection with the negotiations with Weinstein; nothing appeared suspicious in any way, or in connection with the entire matter (Count VI), (VI, 1018); although the usual method of settling a case was for the insurance company to send the release to plaintiff's attorney for execution and return prior to sending the drafts in payment of the claim, that with Weinstein, Perrin sent the releases *and* the drafts at the same time; he did it this way even though the other method had been suggested by his immediate superior; Perrin did this because he trusted Weinstein (VI, 1018-1022).

Perrin had been adjusting insurance casualty cases for about five years; he had "lots of dealings and negotiations with Mr. Weinstein" (VI, 1022, 1026); over the five-year period, Weinstein and Perrin had settled 30 to 40 cases; Perrin's dealings with Weinstein had always been satisfactory; Perrin had never known Weinstein to do anything underhanded in connection with his dealings with Perrin; Weinstein had always been open and above board with Perrin; Weinstein had one of the largest personal injury practices in Oregon (XVI, 3031-3034) .

The foregoing testimony on the part of Perrin is all the more remarkable upon the realization that there was probably no more hostile witness to appear against Weinstein than Perrin. On his second and third appearances, he was particularly so (XVI, 3002-3036; XXIX, 5601-5610; 5627-5655).

Weinstein feels the court erred in allowing Perrin to testify on both his second and third trips to the witness

stand. However, Weinstein is of the opinion that sufficient has been presented herein requiring reversal.

Ray Waterman (Claims manager, Pacific Indemnity Co.):

Waterman was a government witness. He investigated the collision of January 17, 1959. Concerning this he testified as follows on cross-examination:

"Q Your files there would indicate that case was quite thoroughly investigated, that is correct, is it, Mr. Waterman?
A We felt so.
Q And throughout the times that you have had dealings with the defendant, Philip Weinstein, have they always been satisfactory?
A Yes, sir.
Q Have you ever known him not to be open and above board with you?
A No, sir." (XVII, 3313)

The court sustained the government's objection to the last question.

Waterman testified that he "had a lot of dealings with Phil Weinstein—personal, by phone, and by letter and by various types of ways." (XVII, 3301).

James H. Minor (Claims Manager, Fireman's Fund Insurance Co.):

Minor had been with his company for 25 years. He personally handled the investigation of the collision resulting in Counts VII and VIII (XIV, 2605, 2606).

Minor handled the entire settlement of the Page-John Barnard-Allison cases; he testified there was nothing

done by Weinstein in connection with the settlement that was improper; that he had dealt with Weinstein on a number of occasions; these were cases involving personal injuries; Minor said that all of his relations in the past with Weinstein had been satisfactory; that he had never found him not to be open and above-board in his dealings with him (XIV, 2653, 2654).

James K. Buell (Attorney for insurance company, Counts IV and V):

Attorney Buell is a partner in the firm of Phillips, Coughlin, Buell & Phillips. He was called as a government witness. Weinstein attempted to examine Buell as to his dealings with Weinstein. The court sustained the government's objection. Buell would have been called back as a defense witness (VIII, 1510, 1511) had the court not drastically limited the number of Weinstein's character witnesses (XXVII, 5253).

Dr. Joe Davis (Outstanding Portland Orthopedist):

Dr. Davis was put upon, used and recommended by the persons who were setting up the collisions, in the same manner as Weinstein. (See Specification of Error No. I, supra 42-46).

Dr. Davis testified as follows concerning Weinstein:

"Q All right, as a practicing physician have you had either a correspondence or a telephone acquaintance with Mr. Weinstein?

A Yes, I have had, and reported to Mr. Weinstein on numerous occasions in the past over the years as a result of taking care of patients. One time, a long time ago, I know I

had a communication with Mr. Weinstein because he called me about a case that has been a number of years ago, longer than the period of time we are talking about now, but that is the only communication that I have ever had with him.

Q Has there ever been anything improper or underhanded in any way done by Mr. Weinstein in connection with your relationship with him?

A No." (XXII, 4392-4393)

All of the foregoing persons (excepting Dr. Davis) represented interests adverse to Weinstein and his clients.

Attention is invited to the fact that with Buell (Counts IV-V), Perrin (Count VI), Minor (Counts VII-VIII) and Waterman (Collision, January 17, 1959); each episode with which Weinstein had any connection was covered by the testimony of an individual most closely connected with the situation on the opposite side from Weinstein. This fact would appear to have considerable significance.

* * * * *

Weinstein called seven witnesses to testify in his behalf, as to his good character and reputation. At least five of them had business relationships with Weinstein in the past. All of the witnesses had the highest qualifications. All testified without hesitation as to Weinstein's reputation for truth, veracity, honesty and integrity—some in considerable detail on cross-examination. They were:

1. Honorable Alfred T. Sulmonetti, Circuit Court Judge, Fourth Judicial District, Multnomah County, Oregon (XXII, 4277-4284).

2. John Gordon Gearin, partner in law firm of Koerner, Young, McColloch & Dezendorf, Portland. Gearin is National Vice President of Federation of Insurance Counsel. The firm is attorney for the Southern Pacific Company and other large corporations and insurance companies (XXII, 4346-4356).

3. Harry Samuels, partner in the law firm of Vergeer & Samuels, Portland. One of the larger defense firms for insurance companies, such as State Farm Mutual Insurance Company (one of the insurance companies alleged in Counts IV and V), Western Casualty & Surety Company, Northwestern Casualty, most of the Farm Bureau insurance companies, and others (XXII, 4299-4310).

4. Pat Dooley, attorney with the firm of Phillips, Poole & Dooley. The firm business was principally the defense of personal injury accidents arising out of automobile collisions. Mr. Dooley was speaker of the Oregon House of Representatives in 1957 (XXII, 4290-4298).

5. B. B. Calvert, independent insurance adjuster in Portland, engaged in insurance adjusting since 1947; he was formerly with a number of the biggest insurance and adjusting companies (XXI, 4182-XXII, 4214).

6. Honorable J. J. Quillin, Presiding Judge of the Municipal Court of the City of Portland for 20 years; Municipal Court Judge for 24 years up to the present time. He has known Weinstein for 30

years, and Weinstein has appeared in his court frequently for 20 years (XXII, 4215-4223).

7. Captain Lyle R. Mariels, a Captain with the Portland Police Department, and with the department for 27 years. He has commanded every division of the police department except one. He has known Weinstein for at least 35 years (XXVII, 5215-5226).

Weinstein desired, offered to call, and named a number of other witnesses to testify. The court limited him to the above seven (XXI, 4188; XXII, 4205; XXVII, 5252-5254).

VII

The Conviction of Weinstein Was Obtained On the Testimony of Admitted Perjurers and Liars; Persons With Strong Reasons To Favor the Government in Their Testimony.

The chief witnesses against Weinstein were:

1. The Deegans
2. Boisjolie
3. Gordon McCoy
4. Rose
5. Swertfeger
6. Wooldridge
7. Perrin.

Leland Deegan (III, 435, 438, 475-478) and Geraldine Deegan (IV, 627, 643, 652, 657) were admitted perjurers. Gordon McCoy, Rose and Swertfeger all committed perjury in connection with the pending civil actions, and in

the trial of the case of Rose v. Swertfeger (Exs. 27, 29, 34-A, 50-A; VIII, 1468, 1470, 1508).

Of these, the two Deegans and Boisjolie were awaiting sentence on pleas of guilty to mail fraud and conspiracy. None of them were sentenced until February 7, 1962 (R. 231-233).

At the time he testified, Mr. Deegan was also out on bail (once set at $50,000) for intimidation of Boisjolie as a government witness, and he was in a status of awaiting trial (R. 249, 250).

Thus, all three of these people (the two Deegans and Boisjolie) had every reason to extend to the government the greatest cooperation and courtesy. For example,—Boisjolie traveled 200 miles from Portland to Bend, Oregon, and got intimidated by Deegan. [See comment of Judge Solomon on the occasion of Deegan's plea of guilty to the mail fraud charge (XXX, 6028, 6029).]

As for Gordon McCoy, Rose, Swertfeger and Wooldridge, all were named in the indictment as conspirators (Count IX). All could have been indicted at any time for mail fraud and conspiracy, as they well knew. All had reason to be attentive to the wishes of the government.

Leland Deegan finds it impossible to tell the truth. He even lied about his record. It is hard to understand why he bothered. On questioning, he admitted a Dyer Act conviction. He also admitted a conviction for petty larceny which he thought was reversed (III, 560)—Exhibits 503-A, B, C, D and E show five unreversed convictions for Deegan. (These should have been read to the jury had there been time.)

Those are the main witnesses against Weinstein. There were no others of any importance.

VIII

Weinstein Was the Prime Target Of the Government.

Deegan testified that when Postal Inspector Severtson interviewed him prior to the grand jury hearings in the fall of 1960, the following transpired:

"Q And didn't the Government inspector that talked to you before you testified before the grand jury tell you that you had your choice of sitting on one side of the table with those who testified against Mr. Weinstein, or that you had your choice of sitting with those who got indicted, isn't that what you told me up in Mr. Carskadon's office that day?

A Yes, something to that, yes, yes.

Q And isn't the man that told you that Mr. Severtson, who is sitting there at counsel table (indicating)?

A That is correct.

Q And you were indicted, weren't you?

A I was indicted."

* * * *

"MR. DWIGHT SCHWAB: (Q) You did not testify against Mr. Weinstein at the grand jury, did you?

A I didn't testify against nobody, no.

Q You did not testify against Mr. Weinstein, did you?

A No." (III, 475, 476)

This remarkable admission was not denied by Severtson.

Postal Inspector Severtson was a witness at the trial, and was in attendance at counsel table throughout the entire trial.

Anna L. Kimmel was named as a conspirator (Count IX). At the time she testified her name was Anna Kimmel Stewart. She was a passenger in the car driven by defendant DePlois at the time of the collision (Count III). She settled her claim for $5,500 (Ex. 67). She was called as a government witness. On cross-examination, Mrs. Stewart testified as follows:

"Q Mrs. Stewart, your attorney was not Philip Weinstein, was it?
A No, sir.
Q Can you tell me what building your attorney was in, do you recall the Executive Building?
A Yes, that new building.
Q That new building up around Sixth and Yamhill?
A That is right.
Q And you had no dealings whatsoever with Philip Weinstein?
A I don't even know the joker, so *they keep asking if I know him, I don't even know him.*
Q You are speaking of my client.
A Well, I am sorry if I am, that is your problem.

* * * *

"MR. DWIGHT SCHWAB: (Q) I would like one more question: *Who keeps asking you about Philip Weinstein? You said they keeping asking you about him, you mean Mr. Severtson here?*
A *I was asked once by him, yes, and I was asked by different people that questioned me.*
Q *You mean, these police officers, and so on, that questioned you?*
A *Yes.*
Q Have they done that over a period of a long time, many months?
A When they first took me in to question me.
Q And since?
A No.
Q Just when they first took you in to question

you, and they were quite interested in Philip Weinstein, were they?

A I don't know, I don't know nothing about them, I can't tell you nothing." (X, 1960, 1961) (Emphasis added.)

IX

Weinstein Processed and Handled the Staged Collision Cases the Same as He Handled All of the Rest of His Cases— He Had a Tremendous Volume of Business.

Weinstein had one of the biggest personal injury practices in Oregon (VIII, 1521; XVI, 3033, 3034; XXIII, 4585). Weinstein prepared a compilation of all personal injury cases coming into his office during the period of July 1, 1958 to March 1, 1959 (Ex. 499). This was about a month before to a month after the four collisions herein in which Weinstein had some connection. Exclusive of any cases involved here, Exhibit 499 shows he took in 106 new cases during that eight-month period. Those cases grossed eventually over $250,000; Weinstein's fees thereon were about $64,000 for the eight months (XXV, 4885-4897).

In addition, other matters also came into his office (XXV, 4898).

Weinstein was so busy that he referred much business to other lawyers (XXV, 4864, 4865, 4898; XXVI, 5172).

Exhibit 499 lists the 106 cases by name. The honesty of none was challenged by the government.

Weinstein testified in detail concerning how he han-

dled the cases herein (XXIV, 4681-4885). Two of them he sent to attorney Ben Gray (Counts IV and V; XXIV, 4719; Collision of January 17, 1959; XVII, 3225).

Attorneys John Ryan and Nels Peterson testified in detail as to how the average practitioner in the Portland area handling personal injury cases would go about his work (XXIV, 4610; XXV, 4900). Weinstein handled the two cases he retained (Counts VI and VII-VIII) generally in conformance therewith.

Considering the volume of cases and work that he had, *it is absolutely inconceivable that Weinstein, a highly successful practitioner, would have stooped to planned collisions*. It would serve him no earthly purpose!

It is much more reasonable to conclude that Weinstein was fooled and put upon [and irretrievably damaged!] in much the same manner as the insurance companies, adjusters, attorneys, doctors, hospitals and others were fooled and put upon. There is no other logical explanation.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DWIGHT L. SCHWAB,
Of Attorneys for Appellant
Philip Weinstein.